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A TREATISE

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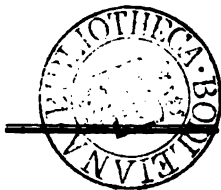
LAW RELATING TO INFANTS.

BY

WILLIAM MACPHERSON,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW:

PART I.—GUARDIANSHIP.



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ADVERTISEMENT.

THE remainder of this Treatise is in preparation, and will comprise the rules established for the protection of the interests of Infants in proceedings at Law and in Equity ; their capacity to contract, and, generally, their powers and disabilities, considered in their relation to society at large.

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A

TREATISE

ON THE

LAW RELATING TO INFANTS.

ALL individuals below the age of twenty-one years are in law called infants. In consideration of the immaturity of their judgment, their persons and estates are usually committed to the charge of others of more advanced years, and Courts of Justice exercise certain powers for their especial benefit and protection.

In some of the transactions of life, they are considered to be absolutely incapable of taking part; in some, they are allowed to engage, with the assistance of protectors; and in others, they are allowed to act for themselves.

In the First Part of the present Treatise, it is proposed to give an account of the different kinds of custody to which infants now are or have in former times been intrusted; of the powers and duties of the guardian with respect to the management and disposition of the infant's person and property; and of the principles on which the Courts will interfere to assist or control him, or will act independently, in furtherance of these objects. The remaining divisions of the subject will be treated of in a subsequent Part.

B

PART THE FIRST.

CHAPTER I.

GUARDIANSHIP IN CHIVALRY.

Guardianship
in chivalry;
—its origin.

GUARDIANSHIP in chivalry arose out of the feudal practice of bestowing land in consideration of military service. It was natural, that when this service was suspended on account of the infancy of the tenant, the lord should resume the fee which had originally moved from himself, until the heir male became capable of wearing heavy armour and doing knight's service, or the heir female of having a husband who could perform the service for her. The infants, on the other hand, whose inheritance the lord enjoyed, had an obvious claim upon him for education and protection; and he was interested in training up his male vassals to arms, and in preventing his female tenants from marrying his enemies. A system based upon these principles existed among the Normans (*a*), and was introduced into England after the Conquest.

Where land
held of single
lord descended
to unmarried
male infant.

Where (*b*), upon the death of one holding by knight's service of a single lord, his or her land descended to an unmarried male heir under the age of twenty-one, the lord was entitled to the custody of the heir's person, and also of the land,

(*a*) Coke's Copyholder, s. 22; (*b*) Litt. s. 103; Harg. n. (11) to
Grand Coustumier c. 33. Co. Litt. 88. b.

until he arrived at the age of twenty-one, when the law supposed him to be fit for the services of chivalry. The guardian might present to churches, have the marriage of women, and take to his own use all other profits and incidents which belonged to the minor and his estates; but could make no alienation of the inheritance. He was obliged to maintain the infant, and was expected to see that he was "in his young years taught the deeds of chivalry, and other virtuous and worthy sciences." Moreover, as he had all the emoluments of the heir, he was to act in all the concerns of the latter, and to prosecute all suits for the recovery of his rights. Finally, it was his duty to restore the inheritance in good condition, and also freed from the debts of the ancestor, in proportion to the duration of the custody, and the value of the estate (c).

Rights of guardian;

—his duties.

The lord's interest in controlling the marriage of his female wards, led to his exacting a price for his consent; and at length it became customary to sell the marriage of wards of both sexes (d).

Right to sell marriage of ward.

A male (e) ward, if he refused an equal match provided by his guardian, was obliged, on coming of age, to pay him the value of the marriage; being as much as had been *bond fide* offered for it; or, if the guardian chose, as much as a jury would assess, taking into consideration all the real and personal property of the ward; and the guardian could claim this value, even if he had made no tender of marriage (g).

Value of marriage;—where the guardian could claim it;

At fourteen, a male became legally competent to consent to marriage. If a tender was made to the ward between fourteen and twenty-one, and he refused it, and within the same period formed an alliance elsewhere, without his guardian's permission, he incurred *forfeiture of marriage*; that

—where he had the double value.

(c) Reeves's Hist. of Eng. Law, vol. 1, p. 114; Glanville lib. 7, c. 9, Co. Litt. 75. b.
 (e) Litt. s. 110.
 (g) Co. Litt. 82. a.; 2 Inst. 92; 5 Rep. 126 b; 6 Rep. 70 b.
 (d) 2 Bl. Comm. 70.

Consequences
of marriage by
lord.

is, he had to pay double the value of the marriage (*g*). If he married without consent after fourteen and before tender, he was charged with the single value. When the guardian disposed of him in marriage, his body was immediately out of ward (*h*); and if a marriage took place, but was afterwards dissolved by disagreement of husband or wife at their respective ages of consent, or by the wife's death before both were capable of consenting, the guardian had not the marriage a second time.

Penalties for
ravishment of
ward.

Where an infant was detained (*i*) or carried off from his guardian, the latter might, at common law, recover body and land in a writ of right of ward, or bring an action of trespass for damages against the abducer; who was liable, moreover, to fine and imprisonment (*k*). Where the infant had been also married, the action was at first the only remedy; but afterwards, by the Statute of Merton (*l*), the guardian was enabled, if the infant was under fourteen, and the ravisher was a layman, to recover the single value of the marriage against the latter, together (*m*) with the infant and his land; and the ravisher was also to pay a fine to the King, and to be imprisoned until both the value and the fine were paid. By the Statute of Westminster the first (*n*), these provisions were extended to infants above the age of fourteen, who should be abducted, either by clergymen or by laymen. By the Statute of Westminster the second (*o*), it was further enacted, that though the ravisher restored the infant unmarried, or paid for the marriage, he should nevertheless be punished with two years' imprisonment; and if he did not restore the infant, or married him after the years of con-

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|---|---|
| (<i>g</i>) Co. Litt. 78. b., 82. b. | (<i>l</i>) 20 H. 3, c. 6. |
| (<i>h</i>) Bro. Garde, 112; Litt. s. 105; Co. Litt. 79. b.; Cowell's Institutes, tit. 22, s. 2. | (<i>m</i>) 2 Inst. 202. |
| (<i>i</i>) 2 Inst. 90. | (<i>n</i>) 3 E. 1, c. 22. |
| (<i>k</i>) 9 Rep. 72. | (<i>o</i>) 13 E. 1, c. 35; see 2 Inst. 439. |

sent, and was not able to make good the value of the marriage, he should, at the discretion of the Court (*p*), either abjure the realm, or suffer perpetual imprisonment. A writ of ravishment of ward was provided for the guardian.

If any man or woman married a ward to his or her child without the guardian's consent, or induced him to leave his guardian, or if he was admitted into any religious order by the superior of the order; this amounted in law to the offence of ravishment (*q*).

What constituted ravishment.

Where the ward had been thus married under fourteen, the marriage might be dissolved at or before that age by disagreement, or by the wife's death before the age of consent; and then, as between the ward and his guardian, things were in the same state as if he had never been married; or the guardian might tender to him a new marriage at fourteen, and if he rejected it, and confirmed his previous match, he incurred forfeiture of marriage (*r*).

Consequences to the ward of marriage without consent.

Where the heir was married and above fourteen at the time of the ancestor's death, the land only was in ward, and no right of marriage accrued. But if he was under fourteen, the lord could take possession of him, because the marriage might be dissolved as above mentioned; in which case, the lord had the right of marriage. If, however, after age of consent, the heir agreed to the marriage, (the wife also agreeing at the proper time), it was good from the beginning, and the lord had no right to the value (*s*).

Where the heir was married and above fourteen; —where under fourteen.

Neither the single nor the double value could be recovered against the heir until he was of full age, when the lord might enforce payment either by action for damages, or by detaining the land (*t*). The taking of the profits was not accounted

The lord's remedy for the value.

(*p*) 9 Rep. 74.

(*r*) Co. Litt. 79. b.; 2 Inst. 91;

(*q*) 2 Inst. 239. b.; see Plac. 45 E. 3, Jugement, 102.

Ab. 134; Berk. rot. 163, (temp. (*s*) Co. Litt. 79. b., 80. a.

Hen. 3).

(*t*) Co. Litt. 82. b.

as part of the single value, but only as a pledge until the heir should satisfy the claim. In the case of the double value or forfeiture, the profits were taken in satisfaction of the charge.

If the heir (*u*) died before payment, the lord had no remedy for the single value; but for the double value he might satisfy himself out of the profits.

Ages of female. A woman might consent to marriage at twelve; but the law seems to have considered fourteen as the age at which she might be expected to have a husband who could perform the services of chivalry. **Where land held of one lord descended to unmarried female under fourteen.** Where land held of a single lord by knight's service descended to an unmarried female heir under fourteen, the lord had the wardship of her body and land up to that age, with the right of disposing of her in marriage (*v*); which ought regularly to have been done between the ages of twelve and fourteen, and the lord could not have held the land after fourteen for the value. **Rights of lord;** But as it often happened that lords, "out of covetousness, would not marry their female wards, but kept the lands at their own will and pleasure many years after their age of fourteen," it was enacted "for the restraint of the wrong, and in truth for the advantage of the lords," that the lord should retain possession of the land until the heir female was sixteen years old, in order that, during the two last years, he might tender to her a proper marriage (*w*). **—two years added.**

If the guardian married his female ward below fourteen, he lost her lands at fourteen. But (*x*) he could not, except in certain cases to be mentioned hereafter (*y*), make her a tender, involving penalties in case of refusal, below fourteen. **Rights of lord as to marriage.** Where he disposed of her in marriage between the ages of fourteen and sixteen, he immediately lost the land; as the purpose for which the two additional years were given had

(*u*) 2 Inst. 91, 93.

203.

(*v*) Co. Litt. 78. b., 82. b.; Litt. s. 103.

(*x*) Co. Litt. 79. a.

(*y*) *Infra*, pp. 10, 11.

(*w*) Stat. Westm. 1, c. 22; 2 Inst.

been satisfied. If he tendered marriage within the two years, and she refused, then, whether she married elsewhere or not, the lord might hold her land until her age of twenty-one, and further until he had levied the single value of the marriage (*z*); but the heir female did not in any case incur forfeiture of marriage, and the lord's remedy for the value was simply personal, except in the case above mentioned. If the lord made no tender between fourteen and sixteen, he could not claim the value. Where the heir female was detained, carried away, or married under fourteen, the lord had the same remedies at common law as in the case of an heir male (*a*), and also those given by the stat. Westm. 2 (*b*). Where this occurred to a girl between fourteen and sixteen, it may be presumed that he had an action for damages.

His remedies
for the value;

—remedies for
raviishment.

Where the heir female was married at the time of the ancestor's death;—if she was above twelve, and below fourteen, the land only was in ward, until she reached the age of fourteen; if she was under twelve when the ancestor died, the lord had the same rights as in the case of an heir male married under fourteen in the lifetime of the ancestor (*c*). If she was above fourteen when the land descended to her, then, whether she was married or not, neither land nor person was in ward.

Heir female
married—rights
of lord.

No wardship
where she was
fourteen.

As the wardship of females ended at fourteen, the lord held the land for the two additional years, not as guardian, but by force of the Statute (*d*). In certain cases, he had value of marriage without tender. If a man left co-heiresses under fourteen, they were all in ward; if some of them were above and others below that age, the lord had the custody of those who were within age, and of their shares in the land.

Nature of the
two years' pos-
session.

Co-heiresses.

Where any infant heir male or female would have been

Ward because
of ward.

(*z*) Stat. Westm. 1, c. 22; Co. Litt. 79. a.; 2 Inst. 204.

(*c*) Co. Litt. 79. a.; 2 Inst. 204.

(*a*) Supra, p. 4.

(*d*) Stat. Westm. 1, c. 22; 2 Inst.

(*b*) Ibid.

204.

entitled, if of full age, to the wardship of another infant, the guardian of the first infant had the wardship of the second, *because of ward* (d).

Lands held of several lords.

Coming from same ancestor at same time.

Priority.

From different ancestors at the same time.

From different ancestors at different times.

Where there was equality of tenure.

Where lands held *in capite*, and lands held of subjects.

Prerogative wardship.

Where lands held by knight's service of several lords, being subjects, descended to an infant heir, each had the wardship of the lands held of himself. If they descended at the same time, and from the same ancestor, the lord of that fee which the ancestor had first purchased, who was called the lord *by priority*, had also the wardship and marriage of the heir. It sometimes happened that a woman, holding of one lord, married a man holding of another lord, and died leaving a child, and also leaving her husband surviving, so that he became tenant by the curtesy of her land. In such a case, upon the husband's death, the heir came into possession, at the same time, of lands descending from different ancestors; and his person was in ward to the lord of the land which had been first purchased. It might happen that lands held of several lords descended to the heir from different ancestors at different times. Where the wardship of the person had once vested in any lord, it was not divested by any subsequent descent of lands to the heir, even (e) if such lands were held of the crown *in capite*.

Where there was no priority of tenure, but the ancestor had acquired, by one feoffment, land held of different lords, that lord who first seised the heir had the wardship of his person (g).

But if the ancestor held lands of the King by knight's service, *ut de coronâ*, (i. e. lands originally holden immediately of the King), which was commonly called tenure *in capite* (h); and also held lands of other lords; then, however, the question of priority might stand, the King, by his prerogative, had the wardship, not only of the heir himself, but of all his

(d) Vin. Abr. Guardian, (B). (H).

(e) 2 Roll. Abr. 35.

(h) Harg. n. (1) to Co. Litt.

(g) Vin. Abr. Guardian, (G). 77. a.; Co. Litt. 77. a., 78. a.

lands, of whomsoever they were held, (not excepting (i) lands of socage tenure); and of such inheritances also as do not lie in tenure; as rent-charges, rents-seck, fairs, markets, warrens, annuities, &c.

If the ancestor held lands of the King by knight's service *ut de honore*, (i. e. lands holden immediately of the King in consequence of the escheat of some honor, or manor), then the King had the wardship of those lands only which were held of himself; except in the case of certain honors, and of lands holden by knight's service of the Duchy of Lancaster in the county palatine, where he had his prerogative (k).

Where lands held *ut de honore*.

An heir female (l) was entitled at fourteen to the possession of all her lands held of any lord *by posteriority*, and might then enter upon him; her person was out of ward for all purposes, except tender of marriage, and she might herself be guardian to any infant heir holding of her, if she had attained fourteen when his land descended to him.

Rights of female at fourteen.

Where lands held by knight's service not *in capite*, and lands held in socage, descended to the heir from the same ancestor; his person and his lands held by knight's service were subject to wardship in chivalry, and his socage land was held by the guardian in socage. Where they descended from different ancestors, he was ward in socage or in chivalry, according as he had come earlier into possession of one inheritance or the other.

Where lands by knight's service and in socage from the same ancestor.

Where from different ancestors.

Although wardship of the kind now under consideration was properly incident to military tenure, yet, in some cases, it extended by custom to the body and lands of tenants in socage (m).

Customary wardship of heir in socage.

Wardship (including the right of marriage) was a chattel which vested absolutely in the lord, immediately upon the

Wardship a chattel in the lord.

(i) Fitzh. Abr. Prerogative, 22, 25; Keilwey, 86, 32, 176; Dyer, 174 a, 369 a; 4 Inst. 196.

(k) Co. Litt. 77. a.

(l) Harg. n. (1) to Co. Litt. 74. b.

(m) Co. Litt. 76. a.; Bro. Garde.

91; Fitzh. Prescription, 58; Bract. 88.

death of the tenant: it was held by the former for his own advantage, and if he died while the heir male was under the age of twenty-one, or the heir female under fourteen, it descended to his executors or administrators; and this even in the case of a bishop, where the lands were held of the see (o). If the lord died within the two additional years given to him in the case of females, his rights, during the remainder of that time, also devolved upon his executors or administrators.

It could not be divested.

Where a vassal held of the King (or any other lord) by knight's service, and a third person held of the vassal by knight's service, and was in ward to him, and afterwards the mesne died, and his heir was in ward to the King (or chief lord), the King (or lord) could not have the tenant in ward, because of ward; for this went to the executor of the mesne, being a chattel vested (p).'

Wardship was saleable.

The King or other lord, after seisin, might sell wardship with all its incidents; and the custody either of the lands or of the person, (the latter including marriage), or of both, might be granted by deed or without deed (q); but the wardship of an advowson could not be granted without deed, because it was derived out of an inheritance that lies in grant, and not in livery. The original lord was called guardian in right; his grantee, guardian in deed (r).

Guardian in right and in deed.

Effect of granting wardship of female under fourteen.

Where the lord granted the wardship of the body of an heir female under fourteen, the grantee could not enjoy the two additional years, because he had not the land; the lord, retaining only the land, had no right to tender marriage, and could not avail himself of the period which had been added only to give time for a tender; and, therefore, the heir female was free at fourteen, both in person and in land. A lord who chose to waive the benefit of the two years, or a grantee of the

Where two years waived.

(o) Co. Litt. 90. a.; 6 Rep. 74; but see Dyer, 370 a.

Co. Litt. 79. a.

(r) Co. Litt. 78. b., 85. a.; 6

(p) Vin. Abr. Guardian, (B). Rep. 75.

(q) Litt. s. 116; Co. Litt. 85. a.;

person only, who could not have the land during the two years, might still take the value of the marriage without any tender; or might legally tender marriage to the heir female between the ages of twelve and fourteen, as the law originally prescribed (s).

If the father of the infant was alive at the time of the descent, and the infant was his son and heir apparent, or daughter and heir apparent, he was guardian by nature of such son, or of such daughter while she continued heir apparent, and the lord had only the custody of the land (t).

Guardian by nature.

If the King conferred knighthood upon an infant ward in chivalry (u), (which might be as soon as he was baptized), this amounted to a judgment that he was able to do knight's service, and his body was immediately out of ward, but his land remained in ward till he reached twenty-one. Although the lord could not in ordinary cases compel the heir to satisfy him for the value of his marriage till his full age, and lost the value if the heir died under age; yet, in this case, immediately after the heir was made a knight, the lord might have a writ *de valore maritagii*. Where marriage was legally tendered to the heir and refused by him, and he was afterwards made a knight and married elsewhere within age, he did not pay forfeiture of marriage. If the infant heir was made a knight in the lifetime of his ancestor, he never was in ward, either for body or for land, nor did any right of marriage accrue to the lord (v).

Consequences of the heir being knighted.

Guardianship in chivalry might be forfeited by disparagement, waste, alienation, outlawry, or attainder.

Causes of forfeiture.

The lord had no right to tender to his ward a match by which he or she might be disparaged (x). The causes of disparagement might be either mental incompetency, inequal-

Disparagement:

(s) 2 Rep. 72; Co. Litt. 79. a.; c. 3.

supra, p. 6.

(t) Co. Litt. 84. a.

(u) 6 Rep. 74; Magna Charta,

(v) 6 Rep. 74; 2 Inst. 12: con.

Vin. Abr. Guardian, (M), pl. 3.

(x) Co. Litt. 80. a.

ity of rank, corruption of blood, alienship, bodily deformity, blemish, or disease, or great disparity of years. Another cause, in very ancient times, was the loss of privilege: as, to marry the heir to a widow in the days when "bigamists," i. e. the husbands of widows, or men who had married again after the death of their wives, were excluded from the benefit of clergy.

The disparagement of heirs was forbidden by Magna Charta and by the Charter of Henry III.; and especial protection was afforded to heirs male by the Statute of Merton.

Its consequences.

If a male heir was disparaged, the lord lost the wardship, both of land and person, and the next cousin or collateral relative of the heir to whom the inheritance could not descend, might enter and oust the guardian in chivalry, and take the issues and profits to the use of the infant. If such cousin refused, another might act; and if none of the cousins would enter, the infant might enter and oust the guardian (y); and although the infant at fourteen might agree to the match, yet the lord did not regain the wardship. There could be no disparagement of an heir male, but when he was married below the age of fourteen (z); because, after that age, he was capable of consenting to any marriage, whether equal or not. For similar reasons, it would seem, that a female could only be disparaged under twelve. It does not exactly appear in what way disparagement of an heir female was punished.

Waste.

If the guardian (a) granted the wardship of the *land* to another *bond fide*, and the heir was disparaged, the grantee of the land did not forfeit his interest. If there were two joint tenants of a ward, and one disparaged him, both lost the wardship.

The Great Charter (b) provided that guardians doing waste

(y) Merton, 20 H. 3, c. 7.

(a) Co. Litt. 80. b.

(z) Litt. s. 107.

(b) C. 4.

should lose their custody. The observation of this enactment was enjoined by stat. Westm. 1 (c); and by the Statute of Gloucester (d), it was declared, that, should the remainder of the wardship not be equal in value to the waste sustained, the guardian should make it up in damages.

The Statute of Westminster 1, provided (e), that if a guardian or chief lord made a feoffment of the inheritance of his ward, the ward should recover by assise of novel disseisin against the guardian and the tenant; and that the seisin should be delivered by the justices to the next friend of the ward, to whom the inheritance could not descend, who was to improve it for the use of the heir, and to account for the profits. If the infant was carried off or disturbed in pursuing his remedy, the assise might be brought by his next friend. Alienation.

Guardianship in chivalry, existing only for the benefit of the lord, was forfeited by his outlawry (g) or attainder of felony or treason. Outlawry or attainder.

It has been said, that the Court of Chancery might remove the person of the ward out of the lord's custody, if he had been guilty of any misbehaviour or ill usage (h). Powers of Court of Chancery.

If a ward of the Crown had any goods, chattels, debts, duties, or other thing due to him, an information might be exhibited by the King's Attorney of his Wards, on behalf of the ward; for the value of the marriage was thereby increased. Chattels of ward of crown.

Wardship (i) might take place even where the tenant did not die seised or in the homage of the lord. What estate drew wardship.

If the tenant had made a feoffment in fee upon condition, and after his death his heir under age entered for a breach of the condition, the heir was in ward, being in the land by descent.

(c) 3 Ed. 1, c. 21.

(d) 6 Ed. 1, c. 5.

(e) c. 48; Vaugh. 180.

(g) 7 Rep. 13 b.

(h) 9 Mod. 141.

(i) Co. Litt. 76. b.

An infant was likewise in ward, when a right of action had descended to him, and he had recovered the land as heir.

Where tenant in tail, the remainder in fee, made a feoffment in fee, and died, leaving the issue in tail within age; if the feoffee infeoffed the issue in tail, whereby he was remitted as heir, he was in ward to the lord.

If a fine executory was levied to a man and his heirs, and he died before execution, and his heir within age entered, the heir was not in ward, for his ancestor never was tenant to the lord.

If the conusor of a fine executory died leaving his heir within age, the lord had the wardship of body and land till the entry of the conusee.

If the tenant of a conditional fee simple died, his heir within age, the lord had the wardship of body and land until the estate was divested by the performance of the condition.

The lord had the wardship of the body of the infant heir of a disseisee. If the disseisor died leaving an infant heir, the lord had also the wardship of the body of such heir, and of the lands. It was doubted whether the heir of the disseisee should then continue in ward, as he could not be tenant until he had recovered the land in an action.

The lord had the wardship of an infant *en ventre sa mere*, and a writ of dower might be brought against him as guardian (i).

Modes of evading it.

Wardship, by the common law, could only take place where there was descent. The ancestor, therefore (j), to prevent it, enfeoffed his heir apparent in his own lifetime; or he made a feoffment in fee to a stranger, not reserving rent, for which he was supposed to be satisfied for a certain term, to end at the time of the heir's attaining full age; and then it was conditioned that the feoffee should pay more than the

(i) Fitz. Abr. Garde, 153.

(j) 2 Inst. 109, 111.

land was worth. The feoffee made default, and the heir entered for breach of the condition. But by the Statute of Marlbridge (*k*), both these expedients were declared to be fraudulent, and a remedy was provided for the lord.

Checked by
statute of Marl-
bridge.

The lord lost his wardship if he accepted homage of the heir apparent in the lifetime of the ancestor, after a feoffment made by the ancestor.

The statute extended to grants as well as feoffments. It did not invalidate conveyances to sons for valuable consideration. It applied to a feoffment in fee-simple made (without valuable consideration) solely to the heir, but not to a lease for life or a gift in tail made to the heir, with the remainder in fee to another; nor to a feoffment made to the heir and a stranger, even though the fee-simple were limited to the heirs of the heir; nor to the case where a man had made a feoffment for the maintenance of his wife, the preferment of his younger children, or the payment of his debts; and had conveyed the land, so subject, to his heir (*l*).

As legal estates only were liable to wardship, the invention of uses enabled the tenant in chivalry to escape this and other feudal burthens, by making a feoffment to uses, and allowing only the use or equitable interest to descend, so that the heir was not the legal tenant.

Evasion by
uses.

But by a statute of Henry VII. (*m*), the heir taking the use of land by descent, was made liable to wardship both of body and land, as if his ancestor had died seised of the legal estate. From this time till the date of the Statute of Uses (*n*), the lord had the wardship of the heir of *cestui que use*, as well as of the heir of the feoffee to uses; the former by the statute, the latter by the common law. Wardship could, during this period, be avoided only by the ancestor's making a lease for life, with remainder to his heirs apparent

Checked by
stat. 4 H. 7.

(*k*) 52 H. 3, c. 6.

(*m*) 4 H. 7, c. 17; Co. Litt.

(*l*) Co. Litt. 78. a.; 2 Inst. 110, 84. b.; 2 Inst. 110.

112.

(*n*) 27 H. 8, c. 10.

The statute of
uses aimed at
evasion of ward-
ship.

in fee (*o*). It may, perhaps, be thought that the practical working of the statute 4 Henry VII., was not satisfactory to the lords in chivalry; for in the preamble to the Statute of Uses (*p*), the loss by lords of their wards, marriages, &c., through fraudulent assurances to uses, is stated as one of the evils which the statute is designed to remedy.

Statutes of
wills and ward-
ships.

The Statutes (*q*) of Wills and Wardships, enabled proprietors to devise two-thirds of their lands which would have been subject to wardship in chivalry, or to enfeoff their heirs to the same extent, and that proportion of the lands was out of ward. But the wardship of the body, and of the remaining one-third of the land, was specially reserved in all cases to the King and other lords.

Effect of these
statutes.

These statutes, according to Lord Coke (*r*), gave a far greater benefit to the lords than the common law gave them; and, notwithstanding some advantage given to the heirs, were yet in many ways prejudicial to the latter; and wardship was extended to many cases previously exempt from it. As, taking one example for many, if tenant by knight's service made a feoffment in fee to the use of his wife and her heirs, or to the use of a younger son and his heirs, or wholly for the payment of his debts; in these cases, although the heir inherited nothing at all of such lands, yet his body was in ward.

Jurisdiction of
the Court of
Chancery.

In the case of *Mr. Justice Eyre v. The Countess of Shaftesbury* (*s*), Lord Commissioner Gilbert stated, that when the tenures were in being, the Court of Chancery had an original jurisdiction of the right of guardianship, and could determine who was the prior and who the posterior lord, when several lords applied for the writ of ravishment of ward. He likewise claimed for the court the whole jurisdiction over the King's wards where the lands were held in chivalry. Lord

(*o*) Harg. n. (11), to Co. Litt. H. 8, c. 5.

88. b.

(*r*) Co. Litt. 78.

(*p*) 27 H. 8, c. 10; see 2 Atk. 150.

(*s*) 2 P. W. 123; Gilb., Eq. R.

(*q*) 32 H. 8, c. 1, and 34 & 35 172.

Coke, too, speaks (*t*) of a cause which had depended thirty years; at first in Chancery, and, since the creation of the Court of Wards, in the latter Court. It seems, however, that this jurisdiction did not extend to the management of the King's wards, but that the Court of Exchequer (*u*) anciently superintended them as a source of revenue, and that (*x*) the Lord Treasurer had a concurrent jurisdiction with the Chancellor where the wardships were profitable to the Crown.

—of the Court
of Exchequer.

In the reign of Henry VIII., a new tribunal, the Court of Wards and Liveries, was instituted for the superintendence of inquests of office, and the regulation of the various fruits of tenure, and of the affairs of idiots (*y*). To this court was transferred the exclusive management of the King's wards, whose wardship and marriage it generally sold on behalf of the Crown. It was a Court of Equity, and its process was the same with that of the Duchy Court of Lancaster. The judges were the Master of the Wards, (who was frequently the Lord Treasurer or some other high officer), the King's Attorney of the Wards, a receiver-general, and two auditors. Some of the chief justices appear to have acted as assessors; and in difficult questions of law, cases were made out for the opinion of all the judges of England (*z*). The court seems to have taken cognizance of all matters affecting the lands of the wards. An infant being in ward to the Queen by reason of tenure by knight's service not *in capite*, a question as to the guardianship of some lands which he held in socage, (and to which the Crown had no claim), was determined by the Court upon bill and answer, with the assistance of a certificate from the judges (*a*).

Court of Wards
and Liveries.

Its process.

The judges.

Incidental ju-
risdiction.

(*t*) 4 Inst. 196.

Comm. 258.

(*u*) 4 Inst. 108.

(*x*) *Carell v. Cuddington*, Plowd.

(*x*) 9 Mod. 141.

C. 295; *Mildmay's case*, 1 Rep.

(*y*) 32 H. 8, c. 46; 33 H. 8, c. 174 b.

22; see 4 Inst. 201; Reeve's Hist. of Eng. Law, vol. 4, p. 258; 3 Bl.

(*a*) *Carell v. Cuddington*.

Evil effects of
guardianship in
chivalry.

The Court of Wards and Liveries acted with great vigour ; and the system of wardship in chivalry, always harsh, was now felt, beyond all other feudal burdens, to be based on reasons which no longer existed, to be opposed to every natural and generous feeling, and to be a fruitful source of domestic vice and misery, and of public evil. Lord Bacon says of chivalry, "time was when it had other uses, and the name of knight's service imports it ; but *vocabula manent, res fugiunt* ;" and he mentions the hardship of separating children from their relatives (*b*). It had been remarked that "although the English people in general were tolerably tall of stature, the nobles were in great part little ; owing to the prevalent custom of marrying rich damsels under age (*c*) ;" and Lord Coke says of these early marriages, that he had known some to have prospered well, but more that had proved unfortunate (*d*).

Attempts to
procure its abo-
lition.

He speaks of an attempt which was made in the 18th year of James I., to procure the abolition of the oppressive incidents of military tenure, and expresses (*e*) a confident hope "that so good a motion, tending to the honour and profit of the King and his crown for ever, and the freedom and quiet of his subjects, and their posterities, will some time or other, (by the grace of God), by authority of Parliament, take effect and be established." The sittings of the Court of Wards and Liveries were discontinued in 1645 ; and Lord Coke's hope was fulfilled after the Restoration, when an act was passed (*g*) "for taking away the Court of Wards and Liveries and tenures *in capite*, and by knight's service ; and Purveyance ; and for settling a revenue upon his Majesty in lieu thereof ;" and the military tenures in general were turned into common socage.

It is abolished.

(*b*) Speech on Wards and Tenures, 7 Jac.

Fortescue, by Amos, c. 44 ; Swinb. part 3, a. 11.

(*c*) See Raumer's 16th and 17th centuries, vol. 2, p. 72 ; Polydor. Lib. 16, p. 288, cited 4 Inst. 191 ;

(*d*) 2 Inst. 234.

(*e*) 4 Inst. 203.

(*g*) 12 Car. 2, c. 24.

CHAPTER II.

GUARDIANSHIP IN SOCAGE.

IN tenure by socage, no military services being required, there was no occasion for the lord to take the profits in order to provide a substitute for his infant tenant (a). The law of guardianship was settled at an early period with some regard for the welfare of the ward himself; an accountable guardian was provided, to insure the safety of his person and land, and his instruction in the art of agriculture, by which he was to live; and it was not thought prudent to commit him to the keeping of any one who, as next in succession to his estate, could have an interest in causing his death. The age of tenant in socage was originally fixed at fifteen, with reference to his fitness for agricultural employment, but fourteen has for many centuries been regarded as his full age (b).

Origin of guardianship in socage.

Ancient and present full ages.

Guardianship in socage can only arise when the infant has land by *descent* (c). His estate, too, must be a *legal* and not merely an *equitable* estate; for, in former times, the law (d) only took notice of the tenant of the legal estate. It was his duty to do all the services, if of age, and if he was an infant, then the burden and right were cast upon the guardian in socage. The guardian in socage, therefore, was only appointed

Of what estate there may be guardianship in socage.

Descent.

Legal estate.

The reason.

(a) 2 Bl. Com. 88.

176.

(b) Robinson on Gavelkind, p. 237, 3rd ed.; Bract. 86 b.

(d) See *Rex v. Toddington*, 1 B. & Ald. 560.

(c) *Quadring v. Downs*, 2 Mod.

in the case of a *legal* estate; for otherwise there would have been this incongruity, viz. that two persons would be bound to perform the services; first, the trustee who, having the legal estate, was bound at common law to do them, and also the guardian in socage for the *cestui que trust*.

Whether there can be guardianship in socage of a reversion.

It would seem that there cannot be guardian in socage of an infant whose interest is only reversionary; since the occupation of the land or receipt of the rents and profits, and the maintenance of the heir out of them, two of the chief duties of the guardian, are in such a case impossible. But this reason does not apply to the case of a descended remainder, when vested in possession.

Descended remainder in possession.

Where land (*e*) held in socage descends from any ancestor, lineal or collateral, to an heir, male or female, under fourteen, the next of *blood* to whom the inheritance cannot descend, (relatives by affinity only, e.g. a stepmother, being in all cases excluded (*g*)), becomes guardian in socage, and is entitled to the custody of the person and land until the heir reaches that age. If the land descends on the part of the father, the wardship belongs to the mother, or, if she be dead, to her father or mother; and, failing them, to her brother or sister, or if there be none, to her uncle or aunt, or whoever is the nearest maternal relative of the heir (*h*): if on the part of the mother, then to the father or the nearest relative on the father's side. If lands descend to the heir from each parent; the wardship of the paternal land belongs to his nearest maternal relative: that of the maternal land, to his nearest paternal relative; the custody of his person remains with whichever first gains possession of him.

Who shall be guardian.

Where land comes on father's side.

Where on mother's side.

Where on both sides.

Where two are equally related.

Where more persons than one are related in equal degree to the heir, as two or more paternal uncles; the law prefers

(*e*) Litt. s. 123; Co. Litt. 87. b., H. 5; Prec. Cha. 283. 88.

(*h*) Bract. 87 b.

(*g*) Co. Litt. 89. b.; Trin. 1,

the eldest. Or, if they be the lineal ancestors of the infant, it is said, that a *male* ancestor is preferred (*h*).

Where land is given to a man and the heirs of his body, and he dies leaving the heir of his body under fourteen, the guardianship rests with the nearest paternal or nearest maternal relative, whichever first seizes the heir, because neither can inherit the land from him. Where land given to father in tail.

Where lands are given in frank-marriage, the next of kin on the part of the mother, to whom the inheritance cannot descend, is guardian, because the mother was the cause of the gift (*i*). Where given in frank marriage.

According to Lord Coke, no one can be guardian in socage to whom the inheritance may by any possibility descend (*k*): as, where a man holding lands in socage in the nature of Borough English, has two sons by different wives, and dies leaving the younger son under fourteen; the elder brother of the half-blood shall not have the custody, because, if the younger die without issue and the land descend to an uncle, the elder brother of the half-blood may succeed to it as heir to the uncle. There must be no possibility of descent.
Half-blood on side on which lands come, excluded.

Mr. Hargrave remarks (*l*) that "this point appears to have been adjudged *contra* in Lord Coke's time, though it is not taken notice of by him. See *Swan's case*, 2 Ro. Abr. 40; Ow. 178; Mod. 635; Cro. Eliz. 825; 2 And. 71. However, as Lord Coke here decides against the half-blood, the question was revived after the Restoration, but the case did not produce any opinion of the Court. T. Jo. 17. The rule, as expressed by Lord Coke, certainly excludes the half-blood, because he extends it to *all* possibility of descent; but if the judgment in *Swan's case* was right, the rule should be confined to all possibility of *immediate* descent." Hargrave contra.

Mr. Hargrave seems to have written the foregoing note But not sup-

(*h*) Harg., n. (13) to Co. Litt. Garde. 146.
88. b.; but see *Carell v. Cuddington*, infra, p. 23. (*k*) Co. Litt. 88. b.
(*l*) Ibid. n. (5).
(*i*) Co. Litt. 22. a.; Fitzh. Abr.

ported by the
cases.

under some misapprehension, for the cases referred to are not in the least at variance with the doctrine of Lord Coke.

Swan's case.

Swan's case was as follows :—A woman married and had issue a son. The husband died ; she married a second husband seised in fee of socage lands, and had issue by him, another son. The husband died, his lands descended to his son as heir in socage, and the wife died, leaving the heir in socage within the age of fourteen. The question was, whether the infant's elder half-brother by the mother's side, being of full age, or the mother's brother, should be guardian in respect of the socage lands which the infant inherited from his father. It was held, that the brother of the half-blood should have the office; for he was the nearest of kin to whom the inheritance could not descend.

Case in Jones.

The case in Jones (*m*) arose on a special verdict in ejectment, and the question was, whether a maternal uncle of the half-blood should be guardian in socage, where the land had descended to the infant *ex parte patris*. But it was not found by the verdict that the uncle was next of blood to the heir; and, therefore, as he had made out no title, it was unnecessary to decide the point of law.

The real question in those cases.

The doubt in these cases seems to have been, whether a relative of the *half-blood* could be considered "*next of blood*" for the purpose of being guardian in socage: for there was no possibility in either case of descent, mediate or immediate; and, therefore, the description "to whom the inheritance cannot descend" applied to both. The law, therefore, as laid down by Lord Coke, remains unshaken.

Stat. 3 & 4 Will.
4, c. 106.

It may be observed, that the stat. 3 & 4 Will. 4, c. 106, has made relatives of the half-blood directly inheritable to each other, after those of the whole blood of the same degree.

Coparcener cannot be guardian.

Where lands descend to sisters as coparceners, none can be guardian in socage to the others (*n*).

(*m*) Sir T. Jo. 17.

(*n*) Bract. 87 b.

Where an elder brother purchases land, and the land descends to his younger brother under fourteen, the infant's paternal and maternal relations are equally of the blood of the first purchaser, and the inheritance may descend to both lines in succession, with a preference only of the former.

Where land purchased by an elder brother descends to infant, *query*.

It has been suggested (o) that the relations on the mother's side might be preferred, in settling the socage guardianship, to those on the father's side, as being more remote from the succession.

A grandmother has been excluded from the guardianship on account of a very remote possibility of descent.

Grandmother excluded, where possibility of descent.

In the case of *Carell v. Cuddington* (p), lands which the wife had by descent, were upon marriage settled by fine in tail special, remainder in fee to the right heirs of the wife. The husband and the wife died, leaving issue under fourteen. It was resolved, that the grandfather on the part of the father should have the custody, preferably to the grandmother, on the part of the mother; for though they were in equal degree as to the estate tail, yet, as to the inheritance of the fee-simple, it could never by any possibility descend to the grandfather on the father's side, or any of his blood, being strangers to the wife, from whom the land moved. But, on the other hand, as the land came from the mother, and as she by the fine became a purchaser of the fee-simple, those of her blood might inherit, and through them the grandmother might by possibility take [by descent], and, therefore, by law was disabled to have the guardianship.

In another old case (q), where an infant was seised of an estate tail, with a limitation in remainder to the grandfather on the father's side; it appearing there were divers remainders between his and the infant's estate, the court *would not interpose in favour* of the grandfather of the mother's side;

Grandfather not excluded where remainder limited to him.

(o) Harg. n (2) and n. (13) to Co. Litt. 88. b.

(q) *Sweetman v. Edge*, Cary's Rep. 137, 138.

(p) Plowd. Com. 299 a, 446 a.

to whom the land could not descend. In this case, neither of the grandfathers could take by descent, and the paternal grandfather was not excluded on account of the remainder limited to him.

Effect of limitation of remainder to guardian.

It is worthy of notice, that Lord Chancellor West observed, in a case in the Court of Chancery in Ireland (*p*), that, at common law, it was a good objection to remove a guardian in socage, that a remainder was limited to him: upon a presumption that such guardian would destroy the ward; but it is no objection where a parent is guardian, for it would be a monstrous presumption that a man would destroy his own child to inherit his estate.

The rule as to guardianship in socage disproved.

In *Dormer's case* (*q*) Lord Macclesfield expressed an opinion, that the maxim, that the next of kin to whom the land cannot descend is to be guardian in socage, is not grounded upon reason, but prevailed in barbarous times before the nation was civilized.

Ward because of ward.

Where an infant ward in socage would be entitled, if of full age, to be guardian in socage to another infant; the guardian of the first infant has the wardship of the second because of ward (*r*), and must render an account of each wardship.

Who cannot be guardian in socage.
Infant.

Where the next friend of the heir is an infant, not being ward in socage, the latter is passed over in the guardianship; for a guardian in socage must account, and no writ of account lies against an infant.

Idiot.

For the same reason, we are told (*s*) that an idiot, a man *non compos mentis*, a lunatic, a man *cæcus et mutus* or *surdus et mutus*, or a leper removed by a writ *de leproso amovendo*, not being liable to writ of account, cannot be guardian in socage.

Outlaw.

A person under outlawry or attainder (*t*) cannot be guardian in socage; but if the outlawry is reversed, or if the at-

(*p*) *Morgan v. Dillon*, 9 Mod. 142. 419.

(*q*) 2 P. W. 264.

(*s*) Co. Litt. Litt. 88. b.

(*r*) Co. Litt. 88. b.; Com. Dig.

(*t*) 31 E. 3, cited Ow. 128.

tainer is purged by pardon, or (it would seem) by undergoing punishment, before the descent of the lands to the heir, the capacity for being guardian in socage is restored (u). Guardian in socage does not forfeit his interest, either in the land or in the emblements (x), to the Crown, by outlawry or attainder; because he has nothing to his own use, but to the use of the heir (y).

No forfeiture to Crown.

The father, in case of a tenure in socage, has the custody of his eldest son under fourteen, not as guardian by nature, but simply as guardian in socage (z).

Father simply guardian in socage.

If guardian in socage dies before the ward has completed his fourteenth year, the wardship does not (a) go to the executors, like wardship in chivalry, because it only exists for the benefit of the heir; but it devolves upon the next friend to whom the inheritance cannot descend.

Devolution of the office.

So, where the guardian becomes incapable.

So, where any female guardian in socage is married, the husband has an interest (b) in the custody in right of his wife, and may exercise the functions of guardian during the coverture; but if she dies, he has not the custody by survivorship, because the wife had it in *auter droit* in right of the heir. It seems to follow from these principles, that in case of wardship because of ward, if the first wardship comes to an end while the second ward is under fourteen, the guardianship of the second ward devolves upon the person who would have it if the first infant were dead.

Fitzherbert cites two cases of Edward III. (c), in which

The office for-

(u) Bac. Max. Reg. 11; 9 Geo. 4, c. 32, s. 3.

(b) Plow. C. 294; Co. Litt. 89. a., 351. a.

(x) 14 Vin. Abr. 181.

(c) F. N. B. 143; P. "Hill. 26

(y) Co. Litt. 88. b.; Bro. Garde, 6; Forfeiture, 70.

E. 3, and Hill. 31 E. 3," meaning, probably, (first) case 159 in his Abr. tit. "Garde," which is there cited as H. 26 E. 3, 65, but which stands in the Year Book as of Trin.

(z) Co. Litt. 88. b.; *supra*, p. 11.

(a) Co. Litt. 90. a.

merly assigna-
ble.

Under what
qualifications.

Not now as-
signable.

guardian in socage granted the wardship to a stranger, and the grant was awarded good: and in a case of the same reign, apparently the second of the cases referred to (c), a lease of guardianship in socage was pleaded. It might be convenient, that the guardian, selling the marriage, either for his own benefit, before the Statute of Marlbridge (d), or, after it, for the infant's benefit, should transfer the care of him to the father of his intended wife; for as a guardian in socage had no means of compelling the infant to acquiesce in the proposed match, it was necessary to conciliate his good will (e). But an old writer, referring to Fitzherbert's statement, that guardian in socage can grant the ward to a stranger, says that this is to be understood but during the guardian's life; and that in such case, after the death of the guardian, the next friend might enter (g).

Mr. Hargrave suggests (h) that possibly the cases in Fitzherbert import only, that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward; not that the guardianship itself may be transferred by bargain or sale. Should these ancient authorities not bear the former construction, he still thinks that they seem sufficiently answered by the doctrine and practice of later times; for guardianship in socage being admitted to be a personal trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, cannot well be assignable; and we have Lord Chief Justice Vaughan's authority for saying, that even in his time common experience proved the contrary (i).

26 E. 3, p. 11; and (second) case 161, Abr. "Garde," there cited as of Hil. 33 E. 3.

(c) Fitzh. Garde, 161, see Godb. 316.

(d) Infra, p. 27.

(e) Bro. Garde, 6; Bract. 91 b.

(g) Crompton's Jurisdiction of Courts, 118.

(h) Note (13) to Co. Litt. 88. b.

(i) See Plowd. C. 293; Vaugh. 181; Owen, 115.

Lord Commissioner Gilbert says (*k*), that guardianship in socage is an interest, not of profit, but of honour, committed to the next of kin, inherent in the blood, and, therefore, not assignable, because a stranger could not feel the same anxiety for the welfare of the ward, and because the guardian in socage must account to the heir, and cannot transfer that liability.

Perhaps the authorities may be reconciled by a consideration of Bracton's account of the office.

How the authorities may be reconciled.

That writer informs us, that the next of blood might be guardian in socage, whether his birth was legitimate or not. He has also been understood to say (*l*), that the guardian in socage, like the guardian in chivalry, might sell the marriage of the heir and the wardship of the land for his own behoof, or might take to himself the profits of the land. He was obliged to maintain the heir, and to instruct him in agriculture.

Bracton's account.

The office profitable.

But by the Statute of Marlbridge (*m*), which, Lord Coke says, was only a declaration of the old common law, it is provided, "that if land holden in socage be in the custody of the friends of the heir, because the heir is within age, the guardians shall make no waste nor sale, nor any destruction of the same inheritance, but safely shall keep it to the use of the said heir, so that when he cometh of his lawful age they shall answer to him for the issues of the said inheritance by a lawful accompt, saving to the same guardians their reasonable costs; neither shall the said guardians give or sell the marriage of such an heir but to the advantage of the aforesaid heir: but the next friends which had the ward for all that time, that writs of impleading did not lie, shall have such wardship unto the advantage of the heir, as is said before, without waste, sale, or destruction making."

Statute of Marlbridge.

(*k*) Gilb. Eq. Rep. 175.

(*m*) 52 H. 3, c. 17; 2 Inst. 135;

(*l*) Bract. 88 a, 89 a, 91; 1 Co. Litt. 89. a.

Reeves, 288.

- Present duties.** It is the duty (*m*) of guardian in socage to take possession of the heir's person, and of the lands and tenements which he has by descent; to receive the rents and profits for the heir until the latter reaches the age of fourteen, to keep his evidences of title safely, and to bring him up well.
- Security sometimes required.** Lord Coke mentions a case (*n*), in which a guardian in socage, who had recovered the heir in a writ of ravishment of ward, was obliged, by the rule of the court, to give security for the performance of these duties; and in the case of *Quadring v. Downs* (*o*), Lord Chief Justice North said, he knew that where there was some doubt of the sufficiency of the guardian in socage, the Court of Chancery made him give good security.
- Whether the office can be refused.** Guardianship in socage is a trust reposed in the next friend by the law, and it has been said (*p*) that the office cannot be refused.
- Guardian has an interest in the land.** A guardian in socage has an actual estate and interest in the land (*q*), though not to his own use. He has a right, therefore, to elect whether he will let the estate, or occupy it for the benefit of the ward; and unless he lets it, the law, which imposes the duty of a guardian upon him, will necessarily protect him in the personal occupation and superintendence of it. The law considers a guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it by any person.
- Is irremovable.** Accordingly, a widow, guardian in socage to her daughters under the age of fourteen, has been held to gain a settlement by residing forty days on their estate (*r*).
- Gains settlement.**
- Guardian's possession is seisin of infant.** Where lands are in the hands of the guardian, the possession of the guardian vests the actual seisin in the infant; and before the statute 3 & 4 Will. 4, c. 106, such seisin was sufficient to constitute *possessio fratris*, and to carry the
- Constituted possessio fratris.**

(*m*) Litt. s. 123; Co. Litt. 89.

(*p*) Vaugh. 182.

(*n*) Co. Litt. 89, b.

(*q*) Plowd. c. 293.

(*o*) 2 Mod. 177.

(*r*) *Res v. Oakley*, 10 East, 491.

inheritance, in all cases, to the infant's heir of the whole blood (s).

A man died seised (t) of certain messuages in fee-simple, leaving two daughters by his first wife, and leaving his second wife *enceinte*. The wife and daughters remained in the same house where the father died; and the wife received some rent for the messuages. In six weeks after the father's death, a son was born, and in his lifetime the widow received more rent; then the son died, having lived five weeks and three days, and she received some more rent after his death.

De Grey, C. J., said, that the possession of the mother and daughters was the possession of the daughters; that, on the birth of the son, the estate was divested out of the daughters, and vested in the son, and the mother become his guardian in socage; and that if nothing was done to hinder it, the law would presume that she entered as guardian in socage to her son as soon as he was born. She was in, without any declaration how she was in; and acts, without any words, amount in law to an entry. It was held, that the son had been actually seised of the premises, so as to bar his sisters of the half-blood (u).

The guardian in socage, in the case of bastard *eigné* and mulier *puisé*, may enter on behalf of the mulier (x), and such entry is good to prevent a descent; and he may, in the right of the heir, take the benefit of a condition by entry or re-entry by the common law (y). Where he enters claiming the freehold to the use of the heir, this is a disseisin, and settles the freehold in the heir (z), without any command or assent by the latter, on account of the privity between them.

Where the guardian may enter.

Bastard and mulier.

Condition.

Effect of entry.

(s) 8 Ass. 6; 1 Bro. "Discent" 7 T. R. 386.

pl. 19; 3 Rep. 42 a; Co. Litt. 15. a.

(x) Co. Litt. 245. a.

(t) *Goodtitle d. Newman v. Newman*, 3 Wils. 516. c.

(y) *Ibid.* 215. b.

(z) 27 Ass. 68, Thorp.; see 9

(u) See *Doe d. Barnett v. Keen*, Rep. 106.

It seems that his entry is merely in the right of the heir, and not by reason of any estate which the guardian has in the reversion (a).

He may avoid voidable leases.

It was resolved in the *Earl of Bedford's case* (b), that the King or any other guardian in chivalry might enter and avoid, during the wardship, any voidable leases made by the ancestor, without prejudice to the right of the heir to confirm them on coming of age. The principle of this decision seems equally applicable to guardian in socage; and it is further stated, that if an infant ancestor has made, or if the heir within age, before the entry of his guardian, makes,—a lease for years, rendering rent; the guardian may enter in right of the heir, and avoid the lease. And although, regularly, none shall avoid voidable estates for infancy, but the infant himself or his heirs; yet the guardian may avoid such leases, during the wardship, in the right of the infant himself, and the heir when of full age can make them good by the acceptance of the rent.

Grant copyholds.

Where the ward is lord of a manor, the guardian in socage is lord during the wardship, and may hold courts in his own name, make admittance to copyholds, and grant copies, (if such be the custom of the manor), in reversion; and such grants shall bind the heir, though the land does not come into possession during the wardship: for the heir, by reason of his nonage, cannot grant; the guardian cannot be compelled to occupy the land; and it would be inconvenient if he could not let it by copy (c).

How the grantee is in.

The grantee in such case is in by the custom; for the functions of the lord are merely ministerial, and may be exercised by any one who lawfully fills that character for the time, whatever may be the nature of his estate or interest.

(a) 1 Leo. 323.

Jac. 55, 98; S. C. Godb. 143; 4

(b) 7 Rep. 7 b.

Leo. 238; 1 Cru. Dig. 315; 14

(c) *Shoplend v. Radlen*, or *Shaplend v. Ridler*, Ow. 115; S. C. Cro.

Vin. Abr. 185; 2 P. W. 122.

In like manner, the guardian may re-grant copyholds escheating during the guardianship (d).

If guardian in socage, as lord for the time being, takes a surrender into his hands, and before admittance the custody determines; though the lord comes in above the custody, yet he shall be compelled to make admittance according to the surrender.

The guardian in socage, because he has the custody of the heir, may also take into his possession, as bailiff or receiver, any rent-charge, rent-seck, common of pasture, or any such inheritance, which does not lie in tenure (e).

Takes charge of inheritances not lying in tenure.

As it was the duty of the guardian in socage to instruct the heir in husbandry, and as he may now occupy the land himself, if he thinks fit; it seems reasonable to suppose that the farm stock, at least, might be subject to his custody. There is, however, no legal authority for attributing to the guardian in socage any interest in the chattels of the heir, or, indeed, in anything besides socage lands and inheritances not lying in tenure, in which the heir has a legal estate by descent; and the following expressions of Lord Chief Justice Vaughan, in the case of *Bedell v. Constable* (g), may fairly be understood to restrict the guardian's power to the species of property just mentioned:—

The custody does not extend to chattels.

“If it be insisted that this new guardian (under stat. 12 Car. 2, c. 24) hath the custody not only of the lands descended or left by the father, but of all lands and goods any way acquired or purchased by the infant, which the guardian in socage had not, that alters not the case; for if he were guardian in socage without that particular power given by the statute, he is equally guardian in socage with it, and is no more than if the statute had appointed guardian in

(d) 4 Rep. 23 b; Co. Cop. s. 34; Noy. 85:

(e) Co. Litt. 87. b., 88. a.

(g) Vaugh. 185.

socage to have care of all the estate of the infant, however he came by it (*g*)."

Advowsons;—
who shall pre-
sent.

An ancient authority has said (*h*) that guardian in socage shall have the presentations to churches which are in his ward during the nonage; and the same opinion was expressed by one judge in *Shapland's case* (*i*); but it is settled, by a far greater weight of authority (*k*), that a guardian in socage shall not present in his own name to a benefice, because he can take nothing for it; and, consequently, cannot account for it; and by law he can meddle with nothing that he cannot account for; and it has been laid down that the heir may, therefore, himself present, of what age soever he may be (*l*). The same rule applies, where the infant's interest in the advowson is merely equitable.

The manner in which the heir's right of presentation or nomination ought to be exercised where he is under years of discretion, was discussed in the case of *Arthington v. Calverley* (*m*), where an advowson had been conveyed to trustees, upon trust, to present (in a certain event) such person as the grantor, his heirs and assigns, should, by writing under hand and seal, nominate; and, in default of such nomination, to present a person of their own choice. The living became vacant when the heir of the grantor was only nine months old, but a nomination was made out in his name, and the guardian put the infant's hand and seal to it, or, as the case is stated in a MS. report (*n*), the infant, by writing under his hand and seal, with consent of his mother and guardian, nominated to the trustees.

(*g*) See *Dagley v. Tolferry*, 1 P. W. 235; 1 Eq. Ca. Ab. 300; 17. b., 89. a., 172. a.; Cro. Jac. 99. S. C. *Rotherham v. Fanshaw*, 3 Atk. 629. (*l*) 3 Inst. 156.

(*h*) Hil. 29 E. 3, 5; Fitzh. Abr. 3; Vin. Abr. "Collation," A. pl. 10. "Presentment" 17; Watson's Clergyman's Law, 140. (*m*) 2 Eq. Ca. Ab. "Infant," B. (*n*) Osborn's MSS. in Lincoln's Inn Library, vol. 8, p. 174.

(*i*) Cro. Jac. 99.

The trustees refused to present the nominee, and presented another person. A bill was filed against them in the name of the infant, and they were decreed to present his nominee. Lord Chancellor King said, according to one report (o) "an infant one or two years old may present at law; why may they not nominate? Does the putting a mark and seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, and the bishop to confirm his choice (p); and if this is permitted at law, why should a court of equity act otherwise in equitable estates?"

In the other report before referred to (q), the following remarks are ascribed to his lordship:—

"In all cases infants present to livings; that is the common custom of the realm, which is the common law. It is not said in any case, that an infant shall be of the age of discretion. In such cases, the guardian must present in the name of the infant, or the infant by consent of his guardian; and so are all infant's affairs transacted.

"A presentation by parol is good. An infant may present by writing; that is, a guardian may present in his name. So is the common practice, and the law is so too; and the law ought to govern the power. The guardian ought to put the infant's hand to the nomination, and not a stranger. I think the nomination by the infant plaintiff is good."

Mr. Hargrave remarks, that though this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant without the concurrence of the guardian (r).

(o) 2 Eq. Ca. Abr. Infant, B. 3. (r) Harg. n. (1) to Co. Litt.
 (p) See 3 Atk. 710. 89. a.; 1 Fonbl. Tr. Eq. 84, n.
 (q) 8 Osborn MSS. 174.

The strong presumption that a court of equity would interfere under such circumstances, is favoured by the expressions of Lord King, who attaches much importance to the agency of the guardian. The exact nature of the guardianship in *Arthington v. Calverley*, is not stated; but a guardian in socage, being guardian of the infant's person, seems to come within the scope of his lordship's observations.

Coparceners of
advowson.

Where an advowson descends (*s*) in coparcenary, and the coparceners cannot agree, the first presentation belongs to the eldest or her assigns. Where three sisters, coparceners, held of the Crown, and the eldest died, and her heir was a ward in chivalry of the Crown, the King's presentation was taken to be in right of all; and if a dispute arose on the next vacancy, the heir of the eldest presented (*t*).

A case has been cited from Dyer (*u*), in which there were two coparceners of an advowson; the younger was in ward; the guardian of the younger married the elder, and presented in the name of both. It was doubted whether this should be considered as an exercise of the right of presentation by the eldest alone, so as to give the next turn to the younger sister, having attained her majority. This was probably a case of guardianship in chivalry (*x*); and if so, the presentation in the name of both was right. But it may be questioned whether a guardian in socage, in such a case, would not be bound to disagree on the part of the younger coparcener; for if he agrees, he and his wife secure the two first turns, and if he disagrees, he and his wife have only the first turn, and the younger coparcener has the second turn; so that it is plainly for the interest of the latter to disagree.

Where the
guardian ought
to disagree.

Guardian
makes title in
quare impedit;

A guardian in socage (*y*) of a manor to which an advowson is appendant, in a *quare impedit* against him, may make

(*s*) 2 Bl. Comm. 189; 1 Ves. 340. (*x*) 1 H. Bl. 376, 402, 405.

(*t*) Fitz. Abr. Presentment, 12. (*y*) F. N. B. 33, T. (note); 14

(*u*) Dyer, 550, pl. 5; and see Vin. Abr. 181.

Plowd. C. 333.

title against the stranger in right of the heir, and also have a writ to the bishop thereupon; and if the plaintiff recovers, the heir or tenant of the frank tenement is not bound; but it seems that the guardian in socage cannot himself maintain a *quare impedit* (z).

but cannot bring it.

Guardian in socage, after entry, has the legal possession (a) of the land to the use of the infant; and the form of pleading by a guardian in socage is, that he entered as such, and was possessed. He may in his own name bring trespass or ejectment, distrain for damage feasant, or make a lease for years, until the heir attains the age of fourteen; and he may avow in his own name and right for rent upon a lease (b).

Rights of guardian as landlord after entry.

If a woman, guardian in socage, marries, and joins with her husband in a demise of the infant's land, the demise does not bind the wife longer than the coverture, and she may avoid the lease after her husband's death for the advantage of the infant; for it is, in effect, the act of the infant by the guardian (c).

Lease by guardian under coverture.

It is said in Bacon's Abridgment (d), that the guardian in socage derives his authority from the law, and not from the infant; and if he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be void by the infant's coming of age, but only voidable by him if he thinks fit. For they are not derived barely out of the interest of the guardian, but take effect also by virtue of his authority, which, for the time, was lawful and absolute; and, therefore, all lawful acts done during the continuance of

Duration of leases by guardian in socage.

(s) Contra, Bac. Abr. Guardian, *ley*, 10 East. 491; *Rea v. Sutton*, 5 (G.), and cites Hob. 132, but the Nev. & M. 353; 3 Ad. & Ell. 597, reference is inaccurate; see also S. C.

Watson's Clergyman's Law, 140; (b) Cro. Jac. 98.

Fitz. Abr. Presentment, 17. (c) *Osborn v. Carden*, Plowd.

(s) Hutt, 16; *Wade v. Baker*, C. 293.

1 Lord Raym. 131; *Rea v. Oak-* (d) Tit. Leases, (I. 9).

that authority, are good and may subsist after the authority itself by which they were done is determined; and, consequently, the infant, when he comes of age, may, by acceptance of rent or other act, if he thinks fit, make such leases good and unavoidable.

No authority is cited in favour of this opinion, and on the other hand, the power of the guardian in socage was expressly restricted by the Court in the case of *Wade v. Baker* (d), recognised in a very recent case (e), to granting leases till the infant's age of fourteen. And in *Roe d. Parry v. Hodgson* (g), it was laid down by the Court of Common Pleas, that the offices of testamentary guardian up to twenty-one, and of guardian in socage up to fourteen, are the same; and that a lease for years by a testamentary guardian, is absolutely void when the heir attains twenty-one; it follows, therefore, that a lease for years by a guardian in socage, must be absolutely void when the heir attains the age of fourteen.

Void when the heir attains fourteen.

Guardian in socage cannot accept surrender of lease.

A man holding in socage (h) leased his land for four years, and died, leaving his heir under fourteen. The guardian in socage, before the first lease had expired, leased the same land to the same person by indenture for a new term of seven years. The guardian in socage died, and another person became guardian in socage and ousted the lessee. The question was, whether the lease by the former guardian was valid. It could not be valid unless the first lease came to an end when the second was accepted. It was decided, that the acceptance of the second lease did not operate as a surrender, properly so called, of the first, for a guardian in socage has no estate capable of receiving a surrender; yet

Effect of ad-

(d) 1 Lord Raym. 131.

(h) *Willis v. Whitewood*, Bac.

(e) *Rex v. Sutton*, 5 Nev. & M. Abr. Guardian. (G.); 1 Leon. 158, 353; 3 Ad. & Ell. 597, S. C. 322; 4 Leon. 7; Ow. 45; Hutt.

(g) 2 Wils. 129.

105.

that the first lease was thereby extinguished or determined, by the admission of the guardian's power to make the second lease, which, if the first lease stood in the way, he could not do. mitting his power to make a new lease.

It is laid down in ancient books, that guardian in socage can make partition, and that this will bind the infant if it be equal (i); and also, that if a tenant in socage mortgages his land, the guardian in socage of the heir may tender the mortgage-money in the ward's name (k), even without his consent. Partition.
Tender of mortgage-money.

A guardian in socage may justify the occupation and governance of the land, and likewise of the body, against the heir himself (l). He may justify occupation against the heir.

Although dower could only be properly assigned by persons having a freehold, yet the guardian in chivalry was liable to a writ of dower, or might assign dower without writ; because the law trusted him to plead for the infant heir, and also for his own particular interest (m).

But no writ of dower lies against a guardian in socage; and, therefore, an assignment of dower by him is void (n). May not assign dower.

A guardian in socage (o) cannot convey the property absolutely, like an executor or administrator; he may (p) take seisin, but he cannot give seisin. It has become usual in local acts of parliament to empower guardians in general to convey the property of their wards for the purposes of the act (q). Nor give seisin.

(i) 2 Roll. Abr. 256. 7 Mod. 48, Lord Holt is made to say, "that every guardian may assign dower in *poise*," but he seems to be speaking of guardians in chivalry.
 (k) Mo. 222; 14 Vin. Abr. 185; Co. Litt. 206. b.
 (l) 7 Keilw. 46 b.
 (m) Co. Litt. 38. b.; 9 Rep. 16 b.
 (n) Co. Litt. 35. a.; 6 Rep. 57 b; Bro. Abr. Dower, 63; 29 Ass. 63. Rolle, indeed, (Abr. 1, 682), appends a query to this case: and in
 (o) 10 East, 491.
 (p) Cro. Jac. 142;
 (q) See, (e. g.) 3 & 4 Vict. c. 87, s. 23.

Guardians have also derived, from some late general statutes (*r*), certain powers relating to the surrender and renewal of leases to which infants are entitled. These enactments will form the subject of future consideration.

Heir may enter at fourteen.

It is laid down by Littleton, that when the heir comes to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself, if he thinks fit (*s*).

And call guardian to account.

He may, at any time after reaching fourteen, call the guardian to account for the issues and profits, and may have an action of account against him.

Value of marriage.

In former days, when it was customary to sell the marriage of minors, if the guardian married the heir under fourteen, he was obliged to account to him, or to his executors, for the value, although he had taken nothing for the marriage, unless he had procured for the heir a marriage as valuable as his own: or if he had recovered the value of the marriage in a writ of ravishment of ward, he had to account for it to the heir; as he must, even now, for any damages which he may recover in an action of ravishment (*t*).

No *capias* against guardian.

Every writ of account must be brought against one either as bailiff, receiver, or guardian (*u*). This office of receiver is not the same with that of receiver appointed by the Court of Chancery. Bailiffs and receivers are classed as servants, and may be committed to prison by *capias* in account, under the statute of Westm. 2, c. 11; but guardian in socage is not a servant, and *capias* does not lie against him.

The heir's remedy against him.

Formerly, where the guardian in socage died before he had accounted to the heir, the latter was without remedy, for no writ of account lay against the executors of the guardian (*x*);

(*r*) See 1 Will. 4, c. 65.

(*u*) Co. Litt. 89. a., 172. a.

(*s*) Litt. s. 123; Co. Litt. 89. a.

(*x*) Litt. s. 125.

(*t*) 3 Bl. Comm. 141.

but now, actions of account lie for the heir, his executors or administrators, against the executors and administrators of every guardian, bailiff, and receiver (*y*).

The guardian must upon his account be charged *as guardian*. He shall have allowance of his reasonable costs and expenses in all things. If he receives the rents and profits of the land, and is robbed of them, without his own default or negligence, he shall be discharged of them upon his account. A guardian cannot be charged as receiver; for then he would lose his costs and expenses, which are not allowed to a receiver (*x*). But the account of guardian in socage is only for the issues and profits of the land, including the profits of a park (*a*), and for other monies he is charged as receiver (*b*).

How he must be charged.

Where a woman, guardian in socage, marries, the account lies against her and her husband for the profits taken before the coverture, and against the husband alone, for those taken during the coverture (*c*).

How, where woman guardian in socage marries.

If a stranger enters into the lands of the infant within the age of fourteen, and takes the profits, the infant may call him to account, and charge him as guardian in socage (*d*). In judgment of law he had the custody of the lands, and he is called *tutor alienus*, and the right guardian in socage *tutor proprius*; and it is no plea for him to deny that he is next friend, but he must answer whether he took the profits as guardian: for if he assumed to take them in that character, he shall answer for them accordingly, though he was not guardian *de jure*. For profits received after the infant came to the age of fourteen, he has a writ of account against the stranger as bailiff, when he comes to the age of twenty-

Where stranger is charged as guardian.

Where as bailiff.

(*y*) Co. Litt. 90. b.; 3 Bl. Comm. E. 3, Acc. 60).

164.

(*c*) F. N. B. 118, (B) notes.

(*a*) Co. Litt. 89. a., 172. a.

(*d*) Litt. s. 124; Co. Litt. 89. b.,

(*e*) Bro. Abr. Accompt. 94.

90. a.; Harg. n. (1).

(*b*) F. N. B. 118, (B) notes, (32

Disseisor not charged.

one (d). The action of account, as guardian, does not lie against a disseisor.

Heir's remedy by bill in equity.

The foregoing statements are applicable chiefly to the old law, and actions of account are now very seldom used; but the heir may, at any time during his minority, file a bill in equity by *prochein amy*, to compel either the guardian or a stranger to account (e). Where any person, whether a father or a stranger, enters upon the estate of an infant, and continues the possession, the Court of Chancery will consider such person entering as a guardian to the infant, and will decree an account against him (g). The manner in which guardians' accounts are taken, will be spoken of in a subsequent Chapter.

Guardian in possession liable for non-repair of bridge.

Guardian in socage in possession of lands charged with the repair of a bridge, is indictable for non-repair (h), and he is allowed his disbursements for repairs in his account with the heir.

How responsible for waste.

No writ of waste lay against guardian in socage: this writ is now abolished, but he was and is responsible for waste in an action of account or trespass (i).

Remedies for guardian.

Guardian in socage was entitled to the *droitural* remedy of a writ of right of ward, *de custodia terre et heredis*, until it was abolished by a recent statute (k). He may, upon *habeas corpus*, recover the person of the infant, being under years of discretion (l). He was also, and is still, entitled to the possessory action of trespass at common law, in which damages only could be recovered: and under the statute of Westm. 2, c. 24, he has the action of ravishment of ward, in which he may recover the person of

(d) F. N. B. 118, (B) notes.

(i) Co. Litt. 54. a.; contra 2

(e) 2 Vern. 342, 295; 2 P. W. 119. Inst. 135. But see F. N. B. 59; see

(g) *Morgan v. Morgan*, 3 Atk. 489. also, 3 & 4 Will. 4, c. 27, s. 36.

(k) 3 & 4 Will. 4, c. 27, s. 36.

(h) *R. v. Sutton*, 3 Adol. & Ell. 597; S. C. 5 N. & M. 353.

(l) See the Chapter on Habeas Corpus, *infra*.

the infant, along with damages for which he must account to the latter (*m*).

But a more speedy and summary method of redressing all complaints relative to wards and guardian, is by application to the Court of Chancery.

As to the duration of guardianship in socage, Lord Coke expressly says (*n*), that the lawful and full age of the heir, as to the custody of guardianship, is fourteen. Mr. Hargrave says (*o*), that this species of guardianship "regularly ends, when the infant, whether male or female, attains fourteen; though some say, that this must be understood only where another guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the meantime. Andr. 313."

Duration of the office.

In the case in *Andrews* (*p*), on motion for an information under 4 & 5 P. & M. c. 8, for conspiracy to marry an heiress;—the ground of the judgment was, that the woman was taken from such a person as had the lawful custody of her notwithstanding she was above the age of fourteen years. "For" (as Lord Chief Justice Lee said) "where the Court of Chancery appoints a guardian," [which was here the case], "such guardianship doth not cease on the ward's attaining fourteen, unless another guardian be then appointed. And so it is of a guardianship in socage; though at that age the ward hath a right to choose another guardian."

Dictum of C. J. Lee.

If these remarks be considered in their application to the case before the Court, they will be found to amount only to

Explained.

(*m*) Gilb. Eq. R. 175; 3 Bl. Comm. 141. (*o*) Harg. n. (13) to Co. Litt. 88. b.

(*n*) Co. Litt. 89. a.; and see F. N. B. 118, (B). (*p*) *R. v. Pierson and others*, Andr. 310; S. C. Stra. 1107.

this, that the custody of a guardian in socage, continued beyond the age of fourteen, was still such a lawful custody as to expose an abducer to the penalties of the statute of Philip and Mary. But the custody of the father of an illegitimate child (*q*), which is certainly very different from legal guardianship, has also been held to be a lawful custody for the same purpose. It may, therefore, be stated with confidence, that guardianship in socage ends at fourteen.

How guardian
charged for
profits taken
after fourteen.

That a guardian in socage should continue in possession after the legal determination of his office, is natural enough; but that the law no longer regards him in the same light is evident from the circumstance, that for the rents and profits which he might receive *after* the infant reached fourteen, he is not charged as guardian, with an exemption from personal arrest, but as bailiff (*r*), and *capias* lay against him in the latter capacity, under stat. Westm. 2, c. 11.

Effect of marriage of female ward.

If a female ward in socage marries, the power of the guardian is gone, but if he continues to exercise the office, he is liable to account (*s*).

Guardians holding after the infant's death.

By stat. 6 Ann. c. 18, guardians and trustees for infants, holding the land without consent after the death of the infants, are made trespassers; and in cases of suspicion, the Lord Chancellor is empowered to make order on motion once a year for the production of the infant (*t*).

Guardianship of inheritances not in tenure.

Lord Coke informs us, that if a man (*u*) be seised of a rent-charge, rent-seck, common of pasture, and such like inheritances which do not lie in tenure, and dies, leaving his heir under the age of fourteen; in this case, the heir

(*q*) *Rex v. Cornforth*, 11 East, 9, R. 2 Acc. 132; contra, 4 E. 3, Acc. n.; 1 Bott by Const. 465; 2 Stra. 107.

1162.

(*t*) See Buller, N. P. 85; Harg.

(*r*) 2 Inst. 380; stat. Will. 2, n. (2) to Co. Litt. 87. b.

c. 11; Co. Litt. 89. a.

(*u*) Co. Litt. 87. b.

(*s*) Bac. Abr. Guardian, (E); 10

may choose his guardian: but if he be of such tender years as he can make no choice, then, (if the father has made no disposition of the custody of the child), it were most fit that the next of kin, to whom the inheritance cannot descend, should have the custody of him. And whoever takes the rent, &c., the heir shall charge him in an account.

CHAPTER III.

GUARDIANSHIP BY CUSTOM.

SECTION I.

Guardianship by the Custom of Gavelkind.

Guardianship in gavelkind. Who has the office.	IF a tenant in gavelkind dies (<i>a</i>), leaving his heir or heirs within the age of fifteen, the next of blood, to whom the inheritance cannot descend, shall, (by the appointment of the lord, if there be several in equal degree of kindred), have the custody of the body, lands, and goods of such infant heir, until he attains that age; which is still the full age by the custom of Kent. The lord can take nothing for the appointment, nor could he at any time tender marriage to the heir. When the heir arrives at the age of fifteen, he may claim his lands and goods with the improvements; he has the common action of account against his guardian; or where the guardian has been appointed by the lord, the heir may come to the lord's court and demand his inheritance and the mesne profits of the land; and the lord must cause his land to be delivered to him, and distrein the guardian to yield his account. The guardian should be charged and have allow-
Its objects	
and duration.	
Mode of accounting.	
Duties of the lord.	

(*a*) See Robinson on Gavelkind, 3rd ed., 237 to 247, and notes; Bac. Abr. Guardian, (A.), 2.

ances as guardian in socage at common law ; and if he be found in arrear, the lord must levy of him the arrears by distress. This custom of compelling an account by distress extends to him who is actually guardian, whether by right or not. But if the guardian to whom the lord has committed the custody, is insolvent, the lord or his heirs are chargeable with the deficiency ; and, therefore, in practice, the lord seldom interferes, but guardianship takes place as guardianship in socage does at common law, except that it lasts till fifteen, and extends to personal estate.

Liabilities of lord.

Practical nature of the office.

SECTION II.

Guardianship by the Custom of the Manor.

IF a copyholder dies, leaving his heir within the age at which, by the custom of the manor, he is to be out of ward (*b*), then, unless there be a special custom to the contrary, the lord is obliged to admit the infant by the next of kin, to whom the land cannot descend (*c*), who is thereupon constituted guardian. The rules of succession within manors, usually correspond with the general law of inheritance ; and, therefore, this next of kin is commonly the same person who would be guardian in socage. Hence it has been inferred, that guardian in socage is entitled to the custody of the copyhold lands of his ward, wherever the lord is not authorized by custom to appoint a guardian. But the rules for the descent of lands within a manor, may be different from the rules of descent of socage land ; and the guardian in socage cannot, in such case, have the custody of the copyholds

Guardianship by the custom of the manor.

Where no special custom ; —who shall be guardian.

How far guardian in socage entitled.

(*b*) See 2 Watk. Cop. 96—110 ; 1 Scriv. Cop. 66, 471.

(*c*) 2 Watk. Cop. 415.

of his ward. If, however, an infant is in ward in socage, the guardian in socage is entitled to the custody of his person, whether he has copyhold lands or not.

Powers and
duties of guar-
dian.

The next friend, by whom the lord admits the infant to his land, becomes guardian both of the person and land, (or where another is guardian in socage, of the land only), with the powers and duties of a guardian in socage (c). He must manage and improve the land, and may occupy it if he thinks fit, and thereby gain a settlement (d). He may make leases warranted by the custom, not exceeding the duration of his guardianship, and maintain an action of debt for arrears of rent. He must render to the lord those services which a copyholder can perform by deputy, such as the payment of rent, or ploughing, reaping, and other agricultural services. But he cannot sit upon the homage; for his ward, and not he, is tenant to the lord.

What services
he must render.

✱

What not.

Fealty and suit of court are personal services, and must be performed, not by the guardian, but by the heir, who is himself tenant (e); and the heir is excused these services until the customary wardship is at an end. The guardian must maintain and educate the infant, and render an account, as in socage.

The time and manner of admitting guardians to copyhold land on behalf of infants, have been regulated by a recent statute, the provisions of which shall be stated hereafter (g).

What is for-
feited by waste.

If a guardian of a copyholder commits waste, his wardship only, and not land, is forfeited (h); for the infant is not answerable for the acts of his guardian, who is assigned to him by law.

(c) *Wade v. Baker*, 1 Lord Raym. 131.

(d) *Ree v. Wilby*, 5 M. & S.

510.

(e) 2 Watk. Cop. 108.

(g) See 1. W. 4, c. 65, s. 3.

(h) Co. Cop. s. 59.

If the guardian ill treats the infant, or acts inconsistently with the trust, or knowingly neglects his duty, he forfeits the wardship; and it was usual in former times, for the lord to remove him in such cases (i).

How the wardship may be forfeited.

The guardianship of copyholders generally ceases at fourteen; though, by the custom of some manors, it continues till fifteen, and even perhaps till twenty-one.

Duration of the office.

The lands moved originally from the lord of the manor; and by special custom (k), he may appoint a guardian of his infant tenant, and the rights and duties of this guardian are the same with those which have just been described. It has been held, that a guardian appointed by the lord in pursuance of a special custom, may maintain an action upon the case, in the nature of an *ejectione custodiæ* (l).

Custom for lord to appoint guardian.

His rights and duties.

By special custom, the lord may give the custody to his bailiff. Where, by the custom of a manor, the bailiff of the manor is to have the wardship of the copyhold heir, being under the age of fourteen, such a guardian need neither be admitted nor pay a fine, since he is but a pernor of the profits; and that not in his own right, but in the right of him to whom he his guardian.

A custom for the lord of the manor to assign one to take the profits of a copyhold descended to an infant during his nonage, to the use of the assignee, without rendering an account, has been held good (m); but it may be presumed that the infant could claim maintenance out of the profits, as he could even in the case of wardship in chivalry.

Custom for lord to take the profits.

The customs of manors are in this, as in other respects, exceedingly various.

(i) See *Forms of Appointment and Removal*, 2 Watk. Cop. c. 4. (l) *Coles v. Wallis*, 1 Leo. 328; Cro. Ell. 224.

(k) *Clench v. Cudmore*, Lutw. (m) 1 Leo. 266, ca. 357; 1 Scriv. 1187; see 2 Scriv. Cop. Appendix, Cop. 471. p. (73); 2 Watk. Cop. 416.

Customs of the manors of Stepney and Hackney.

By the custom of the manors of Stepney and Hackney (a), if the heir is above fourteen when the ancestor dies, he is admitted in his own person; if under fourteen, by guardian, who is appointed by the lord according to the rules of guardianship in socage. If such guardian does not accept the office, the steward may admit as guardian any other of the kindred of the infant to whom the land cannot descend. The guardian must give security to the lord for the performance of his duty: and these rules of guardianship apply as well in the case of purchase as of descent.

SECTION III.

Guardianship by the Custom of Cities and Boroughs.

LONDON.

Guardianship by custom of cities;

ANOTHER kind of customary guardianship, is the guardianship of orphans by the custom of the City of London, and of other cities and boroughs (o).

—by custom of London.

The only kind of city guardianship attended with any general interest or importance, is that which prevailed for many ages within the City of London, and which is still authorized by law, although it has fallen into disuse. The general outlines of the system are as follows:—

Not now in use. General outlines.

Where it arises.

When any man or woman, free of the City of London, dies leaving children within age;—by the custom of London, founded on immemorial right, which must have been derived from a grant by the Crown (p) to the corporation, the Mayor and Aldermen in their Court of Orphans, which is

Who have the office.

(a) 2 Watk. Cop. 521.

(o) Co. Litt. 88. b.

(p) See *Wellesley v. Duke of Beaufort*, 2 Bligh. N. R. 124.

a Court of Record, (and is not the same with the Mayor's Court) (*q*), have the custody of the persons, lands, and chattels of such orphans; in the case of males, till the age of twenty-one; in the case of females, till eighteen, or marriage. After the death of a freeman, the Mayor and Aldermen may summon his widow or executor to appear at their court, and give security to exhibit an inventory of his estate (*r*).

Its nature.

Its duration.

Power of court of orphans.

The Chamberlain of London is by custom a corporation sole for this special purpose, and is able to take a bond or recognizance to him and his successors (*s*). He may oblige an executor to give security for performance of the will and payment of legacies to the orphan, and if the executor or administrator refuse an inventory or security, he may commit him till compliance; and this, though he had given security before to the Spiritual Court to account. If a legacy be bequeathed to a city orphan in another county (*t*), the executor or administrator shall be compelled to give security to the Court of Orphans for payment of it: and if the executor or administrator be not a freeman, and does not live within the city, it has been said that Chancery will assist in the security (*u*). The Court of Orphans may exercise the guardianship itself, or may commit it to any other person (*x*).

Of Chamberlain.

Where legacy left in another county.

Court may commit the guardianship.

The Court makes an allowance to orphans for maintenance, in proportion to their estate, and this allowance is called *finding-money*.

Maintenance.

The orphans are entitled to receive their property, with interest at the rate of four per cent., on the determination of the guardianship (*y*).

Interest.

It would seem, that the guardianship extends to lands

Lands out of London.

(*q*) 4 Inst. 248; Com. Dig. Guardian, (G. 1); 14 Vin. Abr. 170; 1 P. W. 715.

(*r*) 1 Rol. 550, l. 45; Hob. 247.

(*s*) 4 Rep. 64 b.

(*t*) 1 Vent. 180.

(*u*) Ch. Ca. 203.

(*x*) 1 Sid. 250.

(*y*) 2 Vent. 341; see Mos. 99.

lying out of London (*x*), belonging to infants who are city orphans, although the custom of London does not affect the succession to real estate (*a*).

Where father
lived out of
London, query.

It has been said, that all the children of a freeman, though he dies, and they were born, out of London, shall yet be orphans subject to the custom (*b*). But in a case in the King's Bench (*c*) the Chief Justice said, that, in a certain case the Court of Orphans had not meddled with infants and lands in the country, because the father had discontinued his trade.

The right of
the city barred
by non-claim.

Where a man for a valuable consideration contracted with the Mayor and Aldermen to become a freeman of London, in order to entitle his wife and children to the benefit of the custom, and died after the lapse of more than forty years, without having been called upon to take out his freedom; it was held, that his personal estate should be divided as if he had been a freeman; but Lord Macclesfield intimated an opinion, that the Court of Aldermen by their non-claim might have barred themselves of their right of guardianship (*d*).

Determination
of the wardship.

The orphan remains in ward until the Mayor and Aldermen adjudge him of full age; and if they delay to do so, a writ shall issue from Chancery to compel them (*e*).

Proceedings on
marriage of city
orphan.

Reference for
settlement.

The consent of the Court ought to be obtained before the marriage of any city orphan, during the guardianship, and the license is usually accompanied by a reference to the Common-Serjeant (who generally superintends the affairs of the city orphans) to approve of a settlement on the marriage, and signify his approbation to the Court (*g*).

(*x*) 1 Sid. 250.

W. 710.

(*a*) 1 P. W. 531.

(*e*) 14 Vin. Abr. 170; Com. Dig.

(*b*) 1 Vent. 180; and see *Rutter*

Guardian, (G. 4).

v. Rutter, 1 Vern. 180.

(*g*) *Frederick v. Frederick*, 18

(*c*) 1 Sid. 250; see 4 Inst. 248.

1 P. W. 710.

(*d*) *Frederick v. Frederick*, 1 P.

Any one who marries an orphan during the guardianship without the license of the Court, is liable to be fined, according to the quality and portion of the orphan, and committed to Newgate till payment; or, at least, must give security for the payment: and this, though the estate of such person deserves a larger portion than the orphan had, and though it does not appear that he had notice of the orphanship, and though the marriage may not have taken place in the city; for orphans are considered to be in the custody of the Mayor and Aldermen, wherever they are (*h*).

Imprisonment
and fine for
contempt.

The Court of Orphans or their committee may have a writ of ravishment of ward (*i*); and if any one takes an orphan out of their custody, he may be imprisoned till he produces the infant or is delivered by due course of law; nor is there any privilege of peerage in such a case (*k*).

For abduction.

No privilege
of peerage.

(*h*) 2 Lev. 32; 1 Vent. 178; 1 Mod. 77. (*k*) *Wilkinson v. Boulton*, 1 Lev. 162; see 2 R. & My. 670.

(*i*) F. N. B. 142 b.; Hob. 95.

CHAPTER IV.

GUARDIANSHIP BY NATURE AND BY NURTURE.

IN the present chapter it is intended, in the first place, to give an account of the ancient technical office of guardian by nature, and to state certain reasons for thinking, notwithstanding its recognition by some modern writers as an existing office, that it ceased to exist when values of marriage were abolished (*a*); and next, to consider the rights of parents, not only in the capacity of guardians for nurture under the old law, but also in the more enlarged sense in which the parental custody is now understood.

SECTION I.

Guardianship by Nature before stat. 12 Car. 2, c. 24.

Guardianship
by nature be-
fore the statute.
Rights of guar-
dian.

UNDER the old law, a guardian by nature was entitled to the custody of his ward's person up to the age of twenty-one, and could sell the marriage for his own benefit (*b*): but he could not assign the *custody and marriage*, that is, the right of marrying the ward; for this right was inseparable from the person of the guardian; nor could he, like the lord in chivalry, compel the ward to marry by exacting penalties for

(*a*) 12 Car. 2, c. 24.

(*b*) Moore, 739; Cro. El. 770.

refusal. The wardship, therefore, was not a chattel in the guardian; it was not forfeited by his outlawry, nor transmissible to his executors (c). The office not a chattel.

The father was guardian by nature of his son and heir apparent; or of his daughter and heir apparent, (or, as we should now say, presumptive), so long as she continued heir apparent (d). Where land held by knight's service descended to the heir apparent under twenty-one, the lord's rights were restricted to the custody of the land: but he became guardian of the person also, if the father, guardian by nature, died during the infancy; or if the father was an alien, or attainted of treason or felony, and, consequently, incapable of having an heir apparent; or if, in the case of a daughter, the birth of another child made her cease to be heir apparent. Where the land was of the nature of borough English, the father was not guardian by nature of his youngest son. Father guardian of heir apparent.
Rights of lord in chivalry.
Where land in borough English.

For the abduction of his heir, the father had trespass or a writ of ravishment of ward, as well against the lord in chivalry as against any other person (e). Remedies for father.

Where no land in chivalry descended to the heir; there, after the death of the father, the mother, and every other ancestor, lineal or collateral, in succession, if he had lands to which the infant was immediate heir apparent, had a right to be guardian by nature, with the same powers and remedies as the father: but the father alone had any claim against the lord in chivalry (g). Where no land in chivalry.
Who was guardian by nature.

But the mother had a right to the possession, as guardian by nature of her own child, as against a paternal grand- Mother preferred.

(c) Vaughan, 180; 7 Rep. 12 b; *Englefield's case*, Ibid. 13 b; *Calvin's case*, Bro. Garde. 6; *Forfeiture*, 70. (d) Co. Litt. 84; 3 Rep. 38 a; 6 Rep. 22; *Gorges' case*. (e) 6 Rep. 22; Cro. El. 770. (g) 3 Rep. 38; 2 Inst. 440.

father having lands to which the infant was heir, although the mother herself had no land (*h*).

Where infant heir apparent to two.

Where the father and mother were dead, if the same infant happened to be heir apparent to two ancestors, as to both a paternal and a maternal grandfather, it has been suggested (*i*) that, in this equality of rights, priority of possession of the infant's person might decide the preference.

Where guardianship by nature and in chivalry concurred.

Where the father was entitled to be guardian by nature, and also to be guardian in chivalry, guardianship by nature prevailed; and if the father died, the wardship of the land descended to his executors, but not the wardship of the body (*k*).

Where right of guardianship by nature and in socage concurred.

Distinction between father's rights in chivalry and in socage.

Littleton says (*l*), that if socage land descends to the heir on the part of the mother, the father shall have the wardship of such lands or tenements. Lord Coke observes (*m*), that, "by this it appeareth that the father in case of a tenure in socage shall be guardian in socage, and shall not have the custody of his eldest son in respect of his paternal natural custody (as he shall have in case of a tenure by knight's service, as before appeareth), but as guardian in socage. And the reason of the diversity is, for that, in the case of tenure in socage, the father must by law be accountable to the son, both for his marriage and also for the profits of his lands, which he should not be, if he had the custody of his eldest son in this case, as his father, in respect of nature; and the act of law never doth any man wrong.

"But no lord or other person, in respect of any tenure by knight's service or otherwise, shall have the custody of any child that is heir apparent to his father, but the father only during his life."

Littleton has said, that the father shall have the wardship

(*h*) F. N. B. 143, G.

(*k*) Co. Litt. 84. b.

(*i*) Harg. n. (12) to Co. Litt.

(*l*) s. 123.

88. b.

(*m*) Co. Litt. 88. b.

of the lands of the heir. Lord Coke explains in what capacity he shall have the custody of his son's person. Where lands in chivalry descended to the son, the father might, as guardian by nature, sell the marriage without accounting for it; and, if he was also lord in chivalry, might take the profits of the land without accounting for them; or any other person who was lord might take them without account: but in socage land, both the marriage and the profits were to be accounted for. The sole object, therefore, of this passage is to distinguish the father's character and rights on the descent of land in socage, from his character and rights on the descent of land held by knight's service.

It is justly observed (n) in Bacon's Abridgment, that "where the father had the custody of his heir apparent in respect of his natural right, he should render no account to the heir; for what the father might receive on such account, would otherwise have belonged, not to the heir, but to the guardian in knight's service."

This kind of guardianship by nature affected only the heir, and did not extend to the younger children; and where a father brought an action for the abduction and imprisonment of a younger daughter, the Judges Anderson, Walmsley, and Kingsmill, held, that the father should not have an action for the taking of any of his children that was not his heir; because the marriage of his heir belonged to the father, but not the marriage of any other of his sons or daughters, and by reason of this loss only the action was given to him. Glanville, however, contended, that an action would lie for taking away any of the children, for that the parent had an interest in them all, to provide for their education (o).

The office did not extend to younger children.

(n) Bac. Abr. tit. Guardian, 770; and see *Wood v. Topham*, (A.) 15. Styles, 216, 227, 235, 303.

(o) *Barham v. Dennis*, Cro. El.

Collaterals
had right of
marriage.

In a still older case it was held, that even a collateral relative, if guardian by nature, had a right to the marriage of his heir, in consideration of what the latter was to inherit from him (*p*); and this, whether the heir was within age or of full age.

Where the
guardian had
remedy for
marriage.

But the heir might marry himself after the age of consent, and the ancestor had no remedy, except where a stranger took the heir by force and married him (*q*).

Thorp's case,
discussion as to
the existence
of the office.

In *Thorp's case*, in the reign of William III., an information in the nature of a conspiracy was brought against certain persons for inveigling a gentleman's son and heir apparent, of the age of eighteen, into a low marriage. One of the defendants was found guilty, but the case was argued in arrest of judgment. In this argument, the qualities of the old guardianship by nature were discussed.

In the Modern Reports (*r*), Lord Chief Justice Holt is represented to have said, "the question is, whether a father hath not the guardianship of his son and heir apparent till the age of twenty-one years, as he had when there was tenure in knight's service."

In Comberbach (*s*), he is made to say, on a subsequent discussion of the same case, "this information is not brought for the injury done to the infant, but for that done to the father; for he is to have the custody of the eldest son: and the reason is, because the common law gives him the estate, and makes no provision for younger children; and, therefore, it is fitting the father should have the care to see him well provided for."

And in Carthew (*t*), "the true reason why, by the law of England, the father hath not the guardianship of his younger children is; because, by our law, the younger children cannot inherit any thing from their father. The guardianship of

(*p*) Fitzh. Garde. 32; 3 Rep. 37;

(*r*) 5 Mod. 224.

Ratcliffe's case.

(*s*) Comb. 456; S. C.

(*q*) Cro. El. 57; Raym. 259.

(*t*) Carth. 386; S. C.

the father, which is a guardianship by nature, continues to the age of twenty-one years; but that is with respect to the custody of the body only." Lord Chief Baron Comyns in his Digest (*u*) understands Lord Holt to speak of a father, guardian by nature, where there is a lord in chivalry; for he says, "but this extends only to the custody of the body and the marriage of the heir, for the lord in chivalry shall have the custody of the land (*x*)."

In his Reports (*y*), Comyns states Holt to have said, "that the father is guardian to the son until the age of twenty-one years by our law, which is founded upon the law of nature; but our law *gives remedy* only in the case of an eldest son, by reason that it makes provision only for him:" and "that the offence was a grave one, and worthy to be punished if the law could reach it."

The Court seems to have thought, that the remedy by criminal information, was properly co-extensive with the father's remedy by civil action for the loss of his son's marriage, and such actions had of course ceased when values of marriage were abolished. No judgment was ultimately given in the cause. But it has since been settled, that, under similar circumstances, a criminal information will lie; not only for a father, but for any person having the lawful custody of an infant, whether the infant is an heir apparent or not (*z*). *Thorp's* case then, so far as it is of any authority at all, tends to shew that the Court thought that the ancient technical guardianship by nature, which connects the father peculiarly with his eldest son, no longer existed.

Effect of
Thorp's case.

Lord Chief Baron Gilbert says (*a*), that the father was not, in propriety of speech, counted the guardian, for the heir was looked upon as part of the family; the father, therefore, had not a writ *de custodia terræ et hæredis*, nor was there any

Nature of the
father's custody.

No dowerful
action.

(*u*) Guardian, (C).

(*x*) Co. Litt. 84. a.

(*y*) Com. Rep. 28.

(*z*) See *Rea v. Green*, 3 Doug. 36.

(*a*) Gilb. Eq. R. 175.

need of a *droitural* action, because he was always in *legal* possession of his son.

Marriage was
the basis of the
office.

It seems plain, therefore, upon the authorities, that the guardianship by nature, of which a description has been given, was an office of a technical and arbitrary character, derived entirely from the interest of the ancestor in disposing of his heir in marriage; and, as appears from its lasting till twenty-one, (while other guardianships determined at fourteen), closely connected with tenure by knight's service.

Whether it ex-
ists now, *query*.

It might have been expected that this office would have ceased to exist, when all "values and forfeitures of marriages by reason of any tenure of the King's Majesty, or of any other by knight's service," were taken away (*b*), and when the practice of selling children in marriage fell into general disuse. As to collateral relatives, this seems to be admitted; but a question may, perhaps, be raised in behalf of the father, though it seems difficult to distinguish the cases on principle. Lord Commissioner Gilbert said, in the case of *Eyre v. Shaftesbury* (*c*), "the father may bring an action against any person for taking away his heir; and so might any ancestor against any person, except against the lord of whom the lands were held in chivalry, before such tenure was wholly taken away." But Blackstone (*d*), having specified as one of the injuries that may be offered to a parent, the marrying his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage,—remarks, that this last injury is now ceased, together with the right upon which it was grounded; for the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie.

Opinion of Gil-
bert;

of Blackstone;

(*b*) 12 Car. 2, c. 24.

172.

(*c*) 2 P. W. 124; Gilb. Eq. R.

(*d*) 3 Bl. Comm. 140.

Mr. Hargrave (e) considers this guardianship by nature to be still in full force, and strictly confines it to the heir apparent; and he says that in modern books, "when guardianship by nature is extended to children in general, or to any besides such as are heirs apparent, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus, when in Chancery the father and mother are styled the natural guardians of all their children born in marriage, or of any of their illegitimate issue, we should suppose those who express themselves so generally to refer to that sort of guardianship, which the order and course of nature, so far as we are able to collect it by the light of reason, seem to point out; and to mean, that it is a good rule to regulate the guardianship by, where positive law is silent; and it is in the discretion of the Lord Chancellor to settle the guardianship (g)."

The investigation of the powers of parents over their infant children at the present day must be preceded by an account of the office of guardianship for nurture, as it has existed from ancient times.

SECTION II.

Guardianship for Nurture.

PARENTS have an undoubted control over all their children, by virtue of their guardianship *for cause of nurture* (h). Where there is no other guardian, whether the

Guardianship
for nurture.

Where it arises.

(e) n. (12) to Co. Litt. 88. b.

(h) Co. Litt. 88. b.; Harg. n. 13;

(g) But see *infra*, p. 61.

1 Bl. Comm. 461.

Who has the office.	infant has land by descent or otherwise, or has other property, or has no property at all (<i>h</i>), the father, or if he be dead, the mother, (but not a grandfather or grandmother, or any other person (<i>i</i>)), is guardian for nurture of every son or daughter, and can maintain an action of trespass against a stranger who takes the infant away. This species of guardianship extends only to the government of the person. The guardian may deliver the infant to another person for instruction, and may take him back whenever he pleases. If he grants over the custody of the infant's person, the grant is good against himself; but the infant may choose whether he will stay or not with the person to whom he has been granted. If the guardian discharges the infant out of his house, and the latter binds himself apprentice, the guardian cannot retake him (<i>k</i>).
To what it extends.	In all dealings with the infant's property, the guardian for nurture is very much on the same footing as a stranger. If a father, guardian for nurture, occupies the land of his son, he is tenant at will (<i>l</i>). A guardian by nurture can only make a lease at will of the infant's land (<i>m</i>). If he makes a lease by indenture to one being in under the title of the infant, rendering rent to himself, which is paid accordingly, yet this is not any disseisin to the infant (<i>n</i>). The old books inform us that he cannot, even with the consent of the infant under fourteen, tender money to save the forfeiture of the estate (<i>o</i>). He may enter in the name of the infant, who has a right of entry, and this vests the estate in the infant without any command or assent (<i>p</i>). Guardianship for nurture ends at the age of fourteen in all cases.
Relations to property.	Duration.
Duration.	

(*h*) Bro. Garde. 70; Mo. 738; (*l*) 1 Rol. Abr. 859; Hil. 14 E. 3 Rep. 38. 3, 7.

(*i*) Contra 3 Com. Dig. 421; (*m*) Lev. 158; Ca. 226.

but see *Rex v. Hasfield*, Burr. Set. (*n*) Rol. Abr. 659.

Ca. 149; Strange, 1131. (*o*) Mod. 222; see p. 37, *supra*.

(*k*) 3 Com. Dig. 421. (*p*) 9 Rep. 106; see p. 29, *supra*.

Testamentary guardians or committees before the statute of Charles II., and guardians appointed by the Spiritual Court, were sometimes, though it would seem improperly, called guardians for nurture (*b*).

The name improperly applied.

SECTION III.

Guardianship of the Father by Nature and by Nurture.

NOTWITHSTANDING Mr. Hargrave's opinion cited above (*r*), it may be safely asserted that there is a right inherent in the father, recognised by positive law, and in no degree dependent on the discretion of the Lord Chancellor, to act as guardian of all his children; not only during the time of guardianship for nurture, but till the age of twenty-one. Lord Holt appears to have recognised this right, when he said (*s*), generally, that the father was guardian of the son till twenty-one, but had *remedy* only in the case of the *eldest*.

The father's guardianship by nature and nurture;

recognised by Lord Holt;

In *ex parte Hopkins* (*t*) Lord Chancellor King said, that "the father is entitled to the custody of his own children during their infancy, not only as guardian by nurture but by nature."

by Lord King;

In *Stileman v. Ashdown* (*u*) Lord Hardwicke calls the father "the natural guardian of the sons *during their minority*." In the case of *De Manneville v. De Manneville*, Lord Eldon admits "the legal natural right of the father to have the custody of the person of his child (*x*);" and in *Wellesley v. The Duke of Beaufort* (*y*), he says, that "the law makes the father the guardian of his children by nature and by nur-

by Lord Hardwicke;

by Lord Eldon;

- | | |
|--|-----------------------------|
| (<i>g</i>) Cro. El. 678, 734; Co. Cop. | (<i>t</i>) 3 P. Wms. 162. |
| a. 23; <i>infra</i> , pp. 70, 71, 72. | (<i>u</i>) 2 Atk. 480. |
| (<i>r</i>) <i>Supra</i> , p. 59. | (<i>x</i>) 10 Ves. 62. |
| (<i>s</i>) Com. 28. | (<i>y</i>) 2 Russ. 21. |

by Lord Redesdale;

ture." In the same case, Lord Redesdale said, that "the father is intrusted with the care of his children, because it is supposed that he would best execute the trust." In the case of an infant of the age of eighteen, Lord Eldon says that (z) "a guardian cannot be appointed during the father's life, although in certain cases a person may be nominated to act as guardian;" nor does the Court of Chancery ever take upon it to appoint the father guardian.

by Blackstone.

Blackstone, after mentioning the King's general protection of infants, says, that when a *fatherless* child has no other guardian, the Court of Chancery has a right to appoint one (a). He states elsewhere (b), that the father is *guardian by nature* of his child, and also (c) that he possesses such power over him as is sufficient to keep him in order and obedience. That "he may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also directed by our ancient law to be obtained; but now it is absolutely necessary, for without it the contract is void (d). And this also is another means which the law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. The legal power of a father, (for a mother, *as such*, is entitled to no power, but only to reverence and respect), the power of a father, I say, over the persons of his children ceases at the age of twenty-one; for they are then enfranchised by arriving at years of discretion, or that point which the law has established, (as some must necessarily be established), when

Powers of father as to child's person:

(z) *Ex parte Mountfort*, 15 Ves.

(c) *Ibid.* 452.

447.

(d) But see the chapter on Marriage, *infra*.

(a) 3 Bl. Comm. 427.

(b) 1 Bl. Comm. 461.

the empire of the father or other guardian gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by [deed or] will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."

As to property, Blackstone says (*e*), that "a father may have the benefit of his children's labour while they live with him and are maintained by him; but this is no more than he is entitled to from his apprentices or servants;" and that (*g*), "if an estate be left to an infant, the father is by common law the guardian, and must account to the child for his profits:" and in another place (*h*), "a father has no other power over his son's estate than as his trustee or guardian; for, though he may receive the profits during the child's minority, yet he must account for them when he comes of age."

over property.

Whether he may receive rents of son's estate.

In the case of *The King v. Sherrington* (*i*), the question was, whether a man had gained a settlement in a certain parish by residing for five or six years in a freehold cottage which had been devised to one of his daughters in her sixteenth year. It was contended, that the father, as the natural guardian of his child, had a right to reside with her; but the Court held that, not being guardian in socage, nor testamentary guardian, he was only the *natural guardian*, and had not in that capacity, any interest in the land belonging to his child. And Hargrave's note was relied on as shewing, that natural guardianship extends no further than the custody of the infant's person. Hargrave's opinion, however, is

Case of *Rex v. Sherrington*.

(*e*) 1 Bl. Comm. 453.

(*h*) Ibid. 453.

(*g*) Ibid. 461.

(*i*) 3 B. & Ad. 714.

founded on the language of Lord Holt in *Thorp's* case, as reported in Carthew (*k*). But we have seen that Lord Holt was speaking of that technical guardianship by nature of an heir apparent, which is different from a father's natural guardianship of his children in general, and which could not take place here, as the father had more than one daughter. The passages above cited from Blackstone (*l*), were not brought before the Court at all.

The following notices of the ancient modes of accounting, may be thought to have some bearing on this subject:—

Ancient modes
of accounting.

We are told by Fitzherbert (*m*), that, where the father occupies the land of an infant, which the infant has by purchase, the infant shall have an account against him as bailiff of his lands.

We learn from the same author (*n*), that, if a man during the minority of the heir enter into the land of the heir, which he has by descent, and take the profits to the use of the heir, the heir shall have an account against him as guardian for the profits received until he comes to the age of fourteen years, and as bailiff for the profits after that time; for he cannot be guardian for socage lands after the heir is fourteen.

Lord Coke observes (*o*), that every writ of account must be brought against one, either as bailiff, receiver, or guardian in socage; and that a guardian in socage cannot be arrested by force of the stat. W. 2, c. 11, (which gives the power of arresting defaulters): for a guardian in socage is *in loco parentis*, and this act beginneth *servientibus*, and this word *servientibus* is to be applied to *balivis camerariis et receptoribus*; for this act soon after this saith, *cum domini hujusmodi servientum dederint eis auditores*; where these words are to be observed, viz. *domini* the lords or masters, and *servientes* servants; which word *servientes* extends to all,

(*k*) Carth. 386; *supra*, p. 56.

(*l*) *Supra*, p. 63.

(*m*) N. B. 117.

(*n*) N. B. 118, (B).; *supra*, p. 39.

(*o*) 2 Inst. 380; stat. W. 2, c.

11; *supra*, p. 42.

and, therefore, the guardian in socage being no servant, nor the heir lord or master, is not by this act to be imprisoned.

It is not surprising that the ancient law, having provided for the father's superintendence, as guardian in socage, of any socage land which a son might have by descent, and also for the lord's guardianship of land held in chivalry, should have omitted to define exactly the father's powers with regard to any land which an infant might have by purchase; for it must have been of rare occurrence, before the Statute of Wills, that an infant should have any land by purchase, as he was not likely to be enfeoffed, by deed *inter vivos*, of land which he could not manage. It is also to be borne in mind, that in former times infants were deemed capable of managing their own lands at the age of fourteen.

Remarks on indefiniteness of father's power.

SECTION IV.

Guardianship of the Mother by Nature and by Nurture.

It would seem, also, that although, where the mother is guardian in socage, the heir may elect a new guardian at the age of fourteen (*p*); and, although guardianship for nurture has been laid down in the books as ending, like the other ancient guardianships, (except chivalry and the guardianship by nature connected with that tenure), at fourteen; and although a Court of Equity, in choosing a guardian, is under no obligation to fix on the mother;—yet the guardianship of the mother, if not superseded either by election or by the appointment of a new guardian by the Court, is the proper and legitimate custody till the infant attains twenty-one.

Guardianship of the mother:

where it takes place:

duration.

(*p*) *Infra*, p. 78.

Opinion of Lord
Commissioner
Jekyll.

In the case of *Eyre v. Shaftesbury* (*p*), Lord Commissioner Jekyll observed, that as the father left no testamentary guardians of his children, the mother was guardian to them by nature, and the marriage of her daughter belonged to her.

Lord Hard-
wicke's defini-
tion of the mo-
ther's power.

In *Villareal v. Mellish* (*q*), Lord Chancellor Hardwicke said, that the right of guardianship of the mother differs from that of the father; she cannot devise as the father may by the statute of Charles II. The mother's right, abstracted from socage, (which was not there the case, there being no lands), arises (he said) from nature. She has a right to the custody of the persons and care of the education; and this in all countries where the laws do not break in. In the case before him, the father not having disposed of the guardianship (*r*), his right devolved to the mother, and Lord Hardwicke saw no reason to take the right from her. In another case (*s*), he said, "I appointed the mother guardian, who is properly so by nature and nurture where there is no testamentary guardian."

And in *Mendes v. Mendes* (*t*), he said, "she was the mother and guardian by nature, therefore, her care must continue till a proper age: and, though a guardianship in socage determines at fourteen, and such infant might elect, yet in this case there are no socage lands, and, consequently, the guardianship continues till twenty-one."

(*p*) 2 P. W. 116.

that the mother was appointed

(*q*) 2 Swanst. 336; *Mellish v.* guardian by her husband's will.

De Costa, 2 Atk. 14, S. C.

(*s*) *Roach v. Garvan*, 1 Ves. 158.

(*r*) It is stated in West, p. 299,

(*t*) 3 Atk. 624; 1 Ves. 91.

SECTION V.

Custody of Pauper and of Illegitimate Children.

PAUPER children, whether legitimate or not, are inseparable from the mother within the years of nurture; that is, under the age of seven. In such cases, even the father of a legitimate child, being unable to perform his duty in maintaining it, must be treated as having waived his legal right. Neither the putative father nor the mother of an illegitimate child has the legal right of guardianship^(u). It seems to have been decided, that the putative father had a right to take an illegitimate child from the parish, and to provide for it; and that, in case of a dispute between him and the mother, the comparative affluence of the parents should be regarded^(x).

Paupers remain with mother till seven.

Neither parent of illegitimate child entitled.

Right of putative father.

Dispute between parents.

(u) *Res v. Felton and Wenman*, p. 460, pl. 612; see *Holland v. 1 Bott*, P. L. by Const. p. 478, pl. 629. *Malken*, 2 Wils. 126; 1 Bott. p. 483, S. C.; *Strangeways v. Robin-*

(x) *Res v. Felton and Wenman*, son, 4 Taunt. 498. *Newland v. Osman*, 1 Bott, 4th ed.

CHAPTER V.

TESTAMENTARY GUARDIANSHIP AT COMMON LAW.

Dictum of Lord
Alvanley; **I**N a modern case (*a*), Lord Alvanley used the following expressions :—"The question will in a great measure depend upon the determinations as to wills of land. It is clear, by the common law, a man could not, by any testamentary disposition, affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the statute 12 Charles II. It is impossible to contend that it was comprehended under the statute 32 Henry VIII. Till that time as to land, and as to guardianship till the later statute of Charles II., the law pointed out the person to succeed; and it was incompetent to the party, by any testamentary act, to alter the succession of the person to inherit the real estate, or whom the law pointed out as guardian, whether the party died intestate or not." This seems a correct statement of the law as affecting the possessors of land.

how to be un-
derstood.

There is reason, however, to think, that where there was no other guardian marked out by the law, testamentary dispositions of the guardianship of children were not unknown, even before the statute of Charles II. Lord Coke, speaking of a sort of guardianship, analogous to guardianship in socage, and arising where an infant succeeds to inheritances not lying in tenure, says that such guardianship takes place

Coke's account
of guardian-
ship.

(*a*) *Ex parte Ilchester*, 7 Ves. 370.

only "if the father hath made no disposition of the custody of the child (b)." He remarks in another place (c), that the guardians of the civil law are of three sorts: 1. *Tutor testamentarius*; 2. *Tutor a prælore datus*; 3. *Tutor legitimus*: and that this in every point agrees with our common law; the third, with our guardian in chivalry or in socage; the second, with our guardian appointed by the Spiritual Court, "where a man deviseth goods unto his child, and appointeth him not guardian."

As to the first he says, "When a man possessed of *certain goods chattels* deviseth these unto his child, and withal committeth the *care of his child's body* and disposition of his substance unto some friend, this committee is *tutor testamentarius*, unto whom belongeth the care and custody of the child's body and the disposition of his substance, until he accomplish the full age of fourteen years; and then immediately he shall be out of ward for his body, but his goods may be kept longer; for as for them they shall remain in the trustee's hands, for so many years as the testator appointed by his last will and testament: for though it be not in the father's power to restrain the liberty of his child's body longer than to the age of fourteen; yet the disposing of his goods he may commit to any, for as long a time as himself shall think expedient.

Old testamentary guardianship:

where it took place.

Duration as to person;

—as to goods.

"So, by the stat. 32 & 34 H. 8, if a man be seised of socage lands not holden of the king *in capite*, he may by his last will and testament commit the ordering of these lands to what friend soever, for as many years as shall seem most convenient; and that friend is *tutor testamentarius*."

Committee of lands in trust.

In a case in the Court of Chancery in Ireland (d), Lord Chancellor West is reported to have said that, by virtue of

History of the office. *Dictum* of Lord Chancellor West.

(b) Co. Litt. 87. b.; *supra*, p. 42. cites Glan. L. 7, c. 6; Brit. c. 35; Swinb. part. 3, s. 10.

(c) Co. Cop. s. 23; and see 3 (d) *Morgan v. Dillon*, 9 Mod. Salk. 176; Cowell Inst. Tit. 14, 135.

the Statute of Wills, fathers did usually devise their socage lands by will to some persons in trust for the heir during his infancy; and, by this means, the guardian in socage, perceiving there was no benefit to be had by the guardianship, very often declined it; so that the heir was without any guardian, which, being a very great inconveniency, was intended to be remedied by stat. 12 Car. 2, c. 24.

But when lands were thus devised in trust for the infant, he could have no legal estate by descent in possession; and, therefore, it seems, could have no guardian in socage (e). Lord Chief Justice Vaughan states (g), that guardianship in socage cannot be refused, and that (h) before the statute of Charles II., a tenant in socage, of full age, might have disposed of his land by deed or will in trust for his heir, but not of the custody and tuition of the heir. Indeed, the words of Lord Coke (i) claim for such committee of the land no power over the person.

Nature of the
office of com-
mittee.

This sort of testamentary guardian or committee, or devisee in trust for the infant, is sometimes spoken of as "a guardian for nurture," although such guardianship for nurture is different from the proper guardianship for nurture which belongs to the father or mother (k); and it seems to have derived any efficiency which it possessed, at least after the infant had reached the age of fourteen, from the guardian's control over the property of the ward.

His powers.

The powers of this kind of guardian depended entirely on the particular terms of the will from which he derived his authority.

Where a man devised that his land should descend to his son, and willed that his wife should take the profits till the full age of the son, for his education and bringing up; the wife married again, and died before her son came of age; it

(e) *Supra*, p. 19.

(i) *Supra*, p. 69.

(g) *Vaugh.* 182.

(k) *Supra*, p. 69.

(h) *Ibid.* 178.

was the opinion of the Justices Wray and Southcote, that the second husband should not have the profits till the full age of the son; for nothing was devised to the wife but a confidence, and she was as guardian or bailiff to keep the infant, which guardianship by her death was determined; but that it would have been otherwise if the father had devised the profits of the land to his wife till the full age of the infant to bring him up, for that is a devise of the land itself (*l*).

In the case of *Pigot v. Garnish* (*m*), A. devised land to his son in tail with divers remainders over, and made B. overseer of his will, and willed "that he should have the education of his son until he attained to his age of one and twenty years; and to receive, set, and let for the son, the said lands so given to him, and thereof to account to his said son, and the said B. to be allowed all his charges which he should expend about his bringing up." It was held that B. was but a guardian for nurture, and could only make leases at will (*n*).

(*l*) 2 Leo. 221.

(*m*) Cro. C. 678, 734; S. C. Dyer 26 b; 3 Bac. Abr. 409, 410. Mr. Serjeant Hill in a MS. note to 14 Vin. Abr. 171, observes, that this case seems not law; Cro. Car. 382; but this refers to the con-

struction put upon the powers of leasing contained in the will, and has no bearing upon the nature of the committee's office.

(*n*) See also as to devises of this kind, Dyer, 8 Eliz. pl. 90.

CHAPTER VI.

GUARDIANSHIP BY APPOINTMENT OF THE SPIRITUAL
COURTS.

Coke's account of it. LORD COKE says (a), "we have *tutorem a pratore datum*, viz. where a man deviseth goods unto his child, and appointeth him not guardian, then it is in the ordinary's hand to commit the ordering of the infant's goods unto some trusty friend, unto the age of fourteen, at what time the infant himself may choose a guardian, for it is a rule in the civil law, *invito curator non datur*; these guardians are commonly called guardians *pur nurture*" (b).

Sanctioned by Blackstone. Blackstone, also, in speaking of guardians *for nurture*, says (c) that, in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.

Hargrave's history of the doctrine. Mr. Hargrave has given (d) the following account of this species of guardianship :—

To what the claim extended. "The right of appointing guardians for the personal estate, and, if there is no other guardian by tenure or otherwise, for the person also, is, we understand, claimed by the Ecclesiastical Court. Swinburne takes notice of such a guardian; but confines his observations on the appointment, and his extent

(a) Co. Cop. s. 23; Cowell, (c) 1 Bl. Comm. 461.
Inst. Tit. 20.

(b) But see *supra*, p. 59. (d) Harg. n. (16), to Co. Litt. 88. b.

of power, to the custom within the province of York (e). In a case first before the King's Bench, in Lord Hale's time, he admitted the right of the Ecclesiastical Court to appoint a curator of the personal estate; and, after his death, the Court inclined to the same opinion (g). In another case, soon after, the Court of King's Bench allowed the right as to the infant's portion, but denied it over the person (h). In the next case on the subject, the question as to the right was largely debated on a plea in prohibition. This alleged that, by the common law used and approved in England, if any person by his will devises any goods to his children, the ordinary, before whom the will is proved, hath used to commit the custody of the sons and their portions till fourteen, and of the daughters and their portions till twelve, except where they are in the custody of any other, by reason of any tenure or by the father's appointment; and if any person detained such infants or their portions, the ordinary hath also used to compel the delivery of them by ecclesiastical censures (i). But on a demurrer this plea was overruled, and the prohibition ordered to stand; the latter being founded on the libel in the suit in the Ecclesiastical Court, which had stated the right in a more extensive way; for the libel was, that, by the ecclesiastical law, every person having the tuition of any infant under age, by the will of the father, or *per judicem competentem*, ought to have the custody of the infant and suit in the Ecclesiastical Court for the detainer. After this case, we find nothing on the subject for a long time. But in a case of the late King's reign, Lee, J., casually takes notice of the Ecclesiastical Court's appointment without objection, saying that the course of the Spiritual Court is, that if the infant is under seven years, they choose a curator; but, if he is seven, he chooses (k). How-

How far admitted.

Reprobated by

(e) Swinburne on Testam. 1st ed. 99. b.
(g) 2 Lev. 162; T. Jo. 190.

(h) 3 Keb. 834.
(i) 2 Lev. 217.
(k) Fitzgib. 164.

Lord Hard-
wicke.

"ever, in a loose note of a still later case, Lord Chancellor Hardwicke is made to say that only guardians *ad litem* can be appointed by the Ecclesiastical Court (*l*). In another case, the report of which is more to be relied upon (*m*), the same respectable judge reprobated it as a presumption in the Ecclesiastical Court to appoint a guardian of the person and estate (*n*); and declared their appointment of any, except when a suit was depending, to be an interference with his power as Chancellor (*o*); and so displeased was he in the instance before him, as to conclude with recommending to the Attorney-General to consider whether a *quo warranto* would not lie against the Ecclesiastical Court. Under a like apprehension of the subject, the late Chief Justice of the King's Bench, in *Miss Calley's case*, spoke of the appointment by the Ecclesiastical Courts as confined to guardians *in litem*, and therefore perfectly insignificant (*p*)."

No trace of
the office in
modern times.

Guardian or ad-
ministrator *du-
rante minore
etate*.

There is no trace in modern times of any appointment, by the Spiritual Courts, of a guardian of person and estate, but (*q*) the name of guardian is given by them to the person to whom they grant administration, *durante minore etate*, of one who would be entitled, if of full age, to such grant (*r*).

The ordinary *ex officio* assigns a guardian to children under seven years of age, to whom the name of *infant* is re-

(*l*) 14 Vin. Abr. 176; pl. 7, in behalf of the infant." See Appendix I.
a note.

(*m*) *Hughes v. Science*, 3 Atk. 631.

(*p*) 4 Burr. v. 3, p. 1436.

(*n*) A man had been appointed guardian or curator to consent to marriage, *and for all other purposes of the law*. See a report of the case, Appendix I.

(*q*) 1 Williams on Executors and Administrators, 324.

(*o*) He said, "they have no power to appoint guardians in any case except guardians *ad litem*, for the purpose of carrying on suits there in

(*r*) *Brotherton v. Harris*, 2. cas. temp. Lee, 131. In this case, it was held that the guardian appointed by the Ecclesiastical Court was to be preferred to the guardian appointed by the Court of Chancery.

stricted in the Ecclesiastical Courts (*s*). A *minor*, that is, a person between the ages of seven and twenty-one, may himself nominate his guardian, who is then admitted in that character by the judge (*t*); but if the minor makes an improper choice, the Court will control it. According to the practice of the Prerogative Court, the guardianship is granted to the next of kin of the child, unless sufficient objection to him is shewn (*u*). If a wife be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her (*x*).

Restriction between *infant* and *minor*.

To whom guardianship is granted.

(*s*) Toller, 100; Sir G. Lee was of opinion that he could not assign a guardian to an infant *en ventre de sa mère*; *Walker v. Carless*, 2 cas. temp. Lee, 560.

dan, 2 cas. temp. Lee, 327; *Oso-land v. Pole*, Prer. Hil. T. 1787; 4 Burn, E. L. 284, n. 5; Tyrwhitt's edition.

(*u*) Toller, 100; in the goods of *Rich v. Chamberlayne*, 1 cas. temp. Lee. 134; *Faulkner v. Jor-*

Ewing, 1 Hagg. 381.

(*x*) Toller, 92.

CHAPTER VII.

GUARDIANSHIP BY ELECTION.

Who may elect
a guardian.

WHEN an heir in socage has no testamentary guardian, he may, at the age of fourteen, when guardianship in socage determines, choose a guardian for the remainder of his minority (*a*).

We are told by Lord Coke, that (*b*) "if a man be seised of a rent-charge, rent-seck, and common of pasture, and such like inheritances, which do not lie in tenure, and dieth, his heir within age of fourteen years, in this case, the heir may choose his guardian; but if he be of such tender years as he can make no choice, [*i. e.* perhaps, under the age of seven, as he may then nominate his guardian in the Spiritual Court (*c*)], then, (if the father hath made no disposition of the custody of the child)," the next of kin, &c., to be guardian. Lord Hardwicke, however, repeatedly spoke of the right to choose a guardian, as restricted to the case of infants having socage land (*d*).

(*a*) Co. Litt. 78. b.; *Mendes v. Mendes*, 1 Ves. 91; S. C. 3 Atk. 624; *Ex parte Watkins*, 2 Ves. 470. Lord Hardwicke is reported to have said, that where there is no testamentary guardian, nor a mother, (who would of course be guardian in socage), twelve is the age for females, and fourteen for males; but the report seems very loose, and according to all the other authorities fourteen is the age for both sexes.

(*b*) Co. Litt. 87. b.
(*c*) Fitzgibb. 164.
(*d*) 1 Ves. 91; 3 Atk. 624; 2 Ves. 375; and see *Ibid.* 470.

It is doubtful in what manner the power, where it exists, ought to be exercised. The form of appointment of a guardian by an infant, drawn by Sir Orlando Bridgman (e), is under hand and seal. It is said (g) that the appointment is generally also delivered as a deed, though such delivery does not seem necessary. Mr. Hargrave informs us (h), that the last Lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for some special purposes relative to his proprietary government of Maryland, named a guardian by deed. This mode was adopted by the advice of two eminent barristers; for though one of them at first doubted whether the administration of the government of the province was not devolved upon the Crown during the infancy, yet he afterwards retracted this idea, and concurred in thinking that the guardian named by the infant might act as lord proprietor. Mr. Hargrave suggests that election by parol might, perhaps, be sufficient, though it would be wrong to trust to a mode so unsolemn; and he observes that there are no cases in print to explain the powers incident to the office, or whether the infant may change a guardian so constituted by himself (i).

How the power should be exercised.

It does not appear to be certain whether an appointment of a guardian by an infant above the age of seven, and under the age of fourteen years, continues after the infant has attained fourteen; but it seems that it continues for the same period as it would if it had been made after fourteen; to avoid the doubt, a ratification of the appointment has sometimes been recommended after the infant arrives at the age of fourteen years (k).

Duration, where the infant elects under fourteen.

(e) Bridgman's Conveyances, 248, 3rd ed.

(h) n. (16) to Co. Litt. 38. b.

(i) Swinb. Testam. ed. 1590, fol.

(g) 3 Byth. Prec. 410, note; Ib. 97 b.

588 (d), 633, 642.

(k) 2 Byth Prec. 402, 411.

Election before
judge on cir-
cuit

The election of a guardian is said to have been frequently made in the last century, before a judge on circuit (*k*). It may be inferred from a MS. note of a case in the last century, that the nomination of guardians by infants was not of frequent occurrence (*l*).

It is stated (*m*), "that the Court of Chancery often calls upon infants to make a choice in Court, but that this choice is liable to any reasonable objection." But it seems that when the infant is said to choose his guardian, no more is meant than that the person so chosen is generally appointed guardian without a reference. He derives his authority from the Court. The practice, however, of choosing guardians in Court, is unknown in modern times, except in the case of illegitimate infants, who are generally allowed to nominate, in Court, guardians to consent to their marriage; and the Court, under the marriage act, appoints the nominee (*n*).

Effect of ap-
pointment by
infant.

Where an infant above the age of fourteen, by deed appoints a guardian for himself; if he has no socage lands, it seems that the appointment will be bad; and even if he has socage lands, such appointment will not supersede the duty and authority of the Court, and a reference for a guardian will be ordered on petition (*o*). Nothing can be stated with confidence as to the powers of guardian by the election of the infant. It is said in Bacon's Abridgment (*p*), that "though the heir in socage at fourteen may choose his own guardian,

As to powers of
guardian, *query*.

(*k*) 2 Ves. 375.

(*l*) *Shafien v. Shafien*, Lent Assizes at Thetford, 1724; 32 Hill MS. 241. An appointment of guardian by deed, by an infant of the age of eighteen, was pleaded in answer to an action of trespass for taking and detaining cows belonging to the infant. Powys, J. of assize, doubted whether any infant could appoint a guardian by deed,

but said he would reserve it as a case; so the deed was read.

(*m*) 2 Ves. 375; *Ex parte Edwards*, 3 Atk. 519; *In re Man*, Set. Dec. 282.

(*n*) See the Chapter on Marriage, *infra*.

(*o*) *Ex parte Watkins*, 2 Ves. 470; and *Locker's case* there cited; *Curtis v. Rippon*, 4 Madd. 462.

(*p*) Bac. Abr. Tit. Leases, (I). 9.

who shall continue till he is twenty-one; yet as well the guardian before fourteen, as he whom the infant shall think fit to choose after fourteen, are both of the same nature, and have the same office and employment assigned to them by the law." Although guardianship by election of the infant has not been abolished, guardianship by appointment of the Court of Chancery is so much more usual and convenient, that the former expedient ought never to be resorted to.

Election not
advisable.

CHAPTER VIII.

GUARDIANSHIP UNDER STAT. 4 & 5 P. & M. c. 8.

Power of father
to appoint.

Nature of the
authority.

Repeal of the
statute.

UPON the construction of the statute 4 & 5 P. & M. c. 8, it was held (a), that a father might appoint the custody of any of his daughters, under the age of sixteen years, by his will, or by any act in his life; to this purpose only, that he who took such damsel out of such custody, under the age of sixteen, should incur the penalty of the act (b). If several persons were appointed by the father, and one of them died, the office did not survive to the others; being but a bare authority for a particular purpose, and under a penal statute, which ought to be construed strictly (c). If the father made no appointment, the mother had this limited and special custody for the purposes of the act, which indeed belonged to any person having by lawful means the education and government of the infant; as, for example, to the father of a natural child who was residing with him. But there is no ground for the assertion that such a father had a right to devise the custody (d). A freeman of London, or of any city or borough in which there was guardianship by custom, could not devise the custody of his child's person under the statute, to the prejudice of the custom (e). This statute was repealed by stat. 9 Geo. 4, c. 31.

(a) 3 Rep. 39 a; *Ratcliffe's case*.

(d) *Rex v. Cornforth*, 11 East, 9,

(b) See *Ridley v. Wilson*, Amb. n.; S. C. 1 Bott. by Const. 465; 73; 1 Bro. C. C. 23; 3 Mod. 84.

S. C. 2 Stra. 1162; see *supra*, p. 42.

(c) 2 P. W. 122; Bac. Abr. Tit.

(e) 1 Sid. 362.

Guardian.

CHAPTER IX.

GUARDIANSHIP BY STAT. 12 CAR. 2, c. 24.

AS long as the feudal tenures continued, generally speaking, infants who had lost their parents were under the protection of the law which then existed, with respect to the treatment and the care of the children. When that was at an end, it was thought fit by a particular statute to enable the father to appoint guardians (a). Occasion of the statute.

Accordingly, by stat. 12 Car. 2, c. 24, it was enacted, that (b) The statute. where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the *father* of such child, whether born at the time of the decease of the father, or at that time *en ventre sa mère*, or whether such father be within the age of twenty-one years, or of full age, by deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants, and that such disposition of the custody of such

(a) 2 Bligh. N. R. 124; 2 Bl. Comm. 88; 7 Ves. 370.

(b) S. 8.

child or children, made since the 24th day of February, 1645, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children, as guardian in socage or otherwise, and that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children, and shall and may recover damages for the same in the said action, for the use and benefit of such child or children. That (c) such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective age of twenty-one years, or any lesser time, according to such disposition as aforesaid, and may bring such action or actions in relation thereunto, as by law a guardian in common socage might do.

The act (d) does not alter or prejudice the custom of the City of London, nor of any other city or town corporate, or of the town of Berwick-upon-Tweed, concerning orphans; nor discharge any apprentice from his apprenticeship.

Religion does
not affect
power to ap-
point guardian.

The father's power of appointing a guardian is not affected by his religious opinions. It may be exercised by a Jew (e).

Father only
can appoint:
—guardian
cannot;

By the words of the stat. 12 Car. 2, c. 24, the father only can appoint the guardian; and, therefore, the guardian so appointed, cannot appoint another guardian; for it is a

(c) S. 9.

(d) S. 10.

(e) *Villareal v. Mellish*, 2
Swanst. 538.

private office of personal trust, and not assignable (g): and —nor mother.
 an appointment of a guardian by the mother is absolutely
 void (h).

Before the act (i), a tenant in socage of full age might have disposed of his land by deed or will in trust for his heir, but not of the custody and tuition of his heir; but a tenant in socage under age could not dispose of the custody of his heir, nor devise or demise his land in trust for him in any manner. Whether a father under age, leaving only chattels, of which he might dispose by will, could appoint by will a guardian of the kind already mentioned (k), does not appear. By the act, the father, whether of full age or under age, was enabled to nominate by deed or will who should have the custody, and for what time; and the land followed as an incident given by the law to attend the custody, not as an interest devised or demised by the father. Since the late Statute of Wills, 1 Vict. 29 (l), this important power cannot be exercised by will by an infant, but it would seem that he may still appoint guardians of his children by deed.

Disabilities of
 infant father
 before the act.

The act en-
 ables him to
 appoint by deed
 or will;

—his power
 now restricted
 to deed.

Lord Eldon says (m), that he takes a deed of appointment of guardians under the Statute of Charles II., to be only a testamentary instrument in the form of a deed.

How far deed
 of appointment
 has a testamen-
 tary character;

Such a deed certainly resembles a will in some respects; for it has no operation during life, and is revocable at pleasure. In the case of *The Earl of Shaftesbury v. Lady Hannam* (n), it was argued that a disposition of guardianship by deed, was in its nature revocable, and had in that case been revoked by will. The Court thought that the mother, claiming under the will, had great probability of law on her side;

(g) Vaugh. 177; 2 P. W. 121; (k) *Supra*, chap. 5.

Gilb. Eq. Rep. 172; 2 Atk. 14; 2 (l) S. 7.

Swanst. 537.

(m) *Ex parte The Earl of Il-*

(h) Vaugh. 180; 3 Atk. 519; 2 *chester*, 7 Ves. 367.

Swanst. 536.

(n) Finch. Rep. 323.

(i) Vaugh. 177.

and, therefore, continued the guardianship with her till she should be evicted by due course of law.

—dealt with as
a deed.

In another case, not long after the statute, an appointment of a guardian by deed, was supported under rather extraordinary circumstances, where the paper had no testamentary character. A man being indebted to another, by deed granted him the guardianship of his children, with a covenant not to revoke the deed. After the father's death, the Lord Chancellor, in regard that there was a just debt owing from the father to the guardian, declared that he would not restrain the latter from receiving the rents and profits of the infant's estate, but only from abusing his person (*n*).

No probate of
will, merely
appointing
guardian.

A will merely concerning the guardianship of a child, takes effect solely by the statute, and the Temporal Courts are to judge whether the appointment has been made pursuant to the statute. In *Lady Chester's case* (*o*), the Court of King's Bench prohibited the Spiritual Court from granting probate of such a will; and in a modern case (*p*), the Spiritual Court itself refused probate.

These facts are adverse to the supposition, that the appointment of guardians under the statute, is in its nature a testamentary act.

Appointment
may be in pos-
session or re-
mainder.

A statutory guardian may be appointed either in possession or in remainder.

What amounts
to appointment.
—*In form*.
Attestation.

An appointment of guardians by a will not duly attested, has been held to have been made good by a codicil duly attested, written on the same paper, making certain alterations in the will, and confirming it in all other respects (*q*).

The appoint-
ment must be
in writing.

In the report of the case of *Lady Teynham*, 9 Mod. 40, we are told that it was resolved in the House of Lords, that the

(*n*) *Lecons v. Sheires*, 1 Vern. 222.

442; see 2 Fon. Tr. Eq. 247.

(*q*) *De Bathe v. Lord Fingal*,

(*o*) Vent. 207; see 7 Ves. 365. 16 Ves. 167; see 1 Madd. El. Pr.

(*p*) *Gilliat v. Gilliat*, 3 Phill. 435.

words of a father upon his deathbed, "that he expected his father would take care to see this child educated in the Protestant religion," were a good appointment to make the grandfather guardian. But the words of the statute expressly require the will or other instrument of appointment, to be in writing; and it is clearly shewn by several other notices of *Lady Teynham's case*, that the report above cited is incorrect (*r*). But the resolution may not improbably have been, that this expression of the father's wishes ought to govern the discretion of the Court in appointing a guardian.

Where a man having no children, devised to his wife and his brother, or the survivor, the guardianship of all his sons hereafter to be born, it was held, that the guardianship extended to all the sons by that or a future marriage; and that this testamentary appointment of guardians was not revoked by a subsequent testamentary appointment not executed according to the statute, and not directly importing revocation (*s*). But by the late Statute of Wills, 1 Vict. 26, the second marriage would have totally revoked the will. No will, not duly executed, can now revoke a will duly executed.

Construction of devise.

Revocation.

In the case of *Mendes v. Mendes*, as reported by Vesey (*t*), the following words occurred in a will:—"I direct that my wife shall have the education and maintenance of my children." The report by Atkyns (*u*) speaks only of a direction by the testator, that a sum of money should be given to his wife annually for the maintenance and education of his children while they should continue to live with her and at her charge. According to both reports, Lord Hardwicke thought that this might amount to a devise of the guardian-

What amounts to appointment.—*In substance.*

(*r*) S. C. 4 Bro. P. C. 302; S. C. cited 2 Atk. 315; Barnard. 139.

ter, 7 Ves. 348.

(*t*) 1 Ves. 89.

(*s*) *Ex parte the Earl of Ilches-*

(*u*) 3 Atk. 619.

ship; but he did not give an absolute opinion, as it was not necessary to determine the point.

In another case, J. S. by his will, appointed (x) M., his wife, sole executrix and guardian of his son; and added, "if my wife shall marry again before my son shall attain his age of twenty-one years, then and from thenceforth, I appoint my brother executor and sole guardian of my son." M. died, the son being about thirteen years of age; and the only question was, whether the testator's brother, (who would have been guardian in case the wife had married before the son had been twenty-one years of age), should be guardian in this case, or the next of kin, to whom the inheritance could not descend.

Lord Chancellor King doubted; but a case being made for the opinion of the Court of Common Pleas, the judges certified that the uncle could not be guardian, but that the guardianship must go to the guardian in socage.

Devise in trust for son, is not devise of guardianship.

Lord Chief Justice Vaughan says (y), that if the father, being of age, should devise his land to J. S., during the minority of his son and heir, in trust for his heir, and for his maintenance and education until he be of age; this is no devise of the custody within the statute, for he might have done this before the statute (z).

Duration of guardianship: Where no time mentioned.

If heir under fourteen;

—if heir above fourteen.

He also states, that if a man devise the custody of his heir apparent to J. S., and mentions no time, either during his minority, or for any other time, this is a good devise of the custody within the act, if the heir be under fourteen, at the death of the father; because by the devise, the *modus habendi custodiam* is changed only as to the person, and left the same as it was as to the time; that is, it would be a good devise of the guardianship till fourteen. But that (a) if the

(x) *Selby v. Selby*, 2 Eq. Ca. 177.

Ab. 488.

(z) *Supra*, p. 69.

(y) *Bedell v. Constable*, Vaugh.

(a) Vaugh. 184.

heir be above fourteen at the father's death, then the devise of the custody is merely void for the uncertainty. For the act did not intend every heir should be in custody till twenty-one, *non ut tam diu, sed ne diutius*; therefore, he shall be in this custody so long as the father appoints; and if he appoint no time, there is no custody.

Lord Hardwicke, however, is reported to have said (b), Where socage land; that although a guardianship in socage determines at the age of fourteen; yet where there are no socage lands, a devise of the guardianship of children will import a guardianship till twenty-one. Where none. And at this day, it may be doubted whether the circumstance of the infant's holding land in socage would be allowed to interfere with the continuance of the guardianship.

The father's power extends to all his legitimate children under twenty-one and unmarried at his decease, or born after (c). Over whom the power extends. The effect given by the Court of Chancery to an erroneous or informal nomination of guardians by a father, will be stated hereafter (d).

Where by the custom of a manor the lord has a right to appoint a guardian for an infant copyholder, the father's appointment will not hold good against such custom as to the land (e); Appointment not good against special custom as to land; but it seems that as to the person, a devise of the guardianship by the father will take effect; just as guardianship in socage, if the infant has socage as well as customary land, would exclude the lord or his nominee from the custody of the person (g). But good as to person. Where no special custom exists, authorising the lord to take the profits, or to appoint a guardian, the better opinion is, that the appointment of the father will be good, both as to the person and as to the land (h). Where no special custom, good as to both.

(b) *Mendes v. Mendes*, 1 Ves. 395.

91.

(c) 2 Bro. C. C. 538.

(d) *Infra*, c. 11.

(e) *Clench v. Cudmore*, 3 Lev.

(g) *Contra*, Co. Cop. s. 23; but

see 2 Watk. Cop. 105; *supra*, p. 46.

(h) See 1 Scriv. Cop. 102, 471,

and the authorities there cited.

Not good
against custom
of cities;

—but good
against all
other.

Popish recu-
sants not to be
appointed.

Papists could
not be guar-
dians.

Statute for their
relief.

Appointment
of Roman Ca-
tholic priest.

Guardian by
statute in Ire-
land.

Required to be
of Church of
England.

Guardianship
of children of
Roman Catho-
lica.

Protestant may

A freeman of London, or of any other city or town corporate where there is a customary right of guardianship, cannot devise the custody of his child's person under the statute (i), in prejudice of such custom; but apparently such devise is good against all except a guardian claiming by virtue of such custom.

By stat. 12 Car. 2, c. 24, s. 8, a father is enabled to dispose of the custody of his child to any person or persons other than popish recusants.

By stat. 25 Car. 2, c. 2, s. 25, papists not taking certain oaths, and yet executing certain offices, were disabled (on conviction) from being (among other things) guardians of children.

But by stat. 31 Geo. 3, c. 32, persons taking the oath thereby prescribed, are not liable to be prosecuted for recusancy.

In a recent case (k), where a Roman Catholic father had appointed a Roman Catholic priest to be guardian to his children, the validity of the appointment was not questioned.

The stat. 12 Car. 2, c. 24, was soon followed by a similar measure in Ireland. By Irish stat. 14 & 15 Car. 2, c. 19, fathers are empowered to appoint guardians in the same manner and with the same authority as in England, except that the guardians were required to be persons of the communion of the Church of England.

In Ireland, still more than in England, the education of children in the Roman Catholic faith was prohibited under heavy penalties; and the guardianship of the children of Roman Catholics of fortune, was given to Protestants (l).

But by the Irish statutes, 21 & 22 Geo. 3, c. 62, the education of children in Roman Catholic principles, was legalized under certain restrictions; and by the Irish stat. 30

(i) S. 10; and see 1 Sid. 362. 1840.

(k) *Talbot v. Earl of Shrewsbury*, before the Lord Chancellor. 4 Bro. P. C. 298. (l) See *Preston v. Lord Ferrard*,

Geo. 3, c. 29, any Protestant may dispose of the custody of his child under age and unmarried, to any person not professing the Popish religion; and any papist, (not being a lapsed Protestant), may dispose of such custody to any person other than an ecclesiastic of the Church of Rome; but no Roman Catholic is capable of acting as such guardian without taking the oath referred to in the act.

appoint protestant.

Papist may appoint any one except Romish priest; —oath to be taken.

A person is not incapacitated to act as guardian by being a dissenter, either in England or in Ireland. Guardianship under the statute, which is commonly spoken of as testamentary guardianship, is not determined by marriage; not even by the second marriage of a mother, followed by the birth of children. It is impertinent to state in an answer to a bill for maintenance, that the husband of the guardian is unfit to have the management of the infants, "being a man of small fortune, increasing family, and also a sectary (m)."

Dissent no disqualification. Guardianship not determined by marriage.

Mr. Serjeant Hill (n) raises the following question:—"Suppose the father should appoint a minor to be guardian of his child; as there is no exception of any persons but Popish recusants, *query* whether the appointment would be good or not? or whether if it be good, the infant guardian could take upon him the exercise of the guardianship before he arrived at the age of twenty-one years? See Justin. Inst. Lib. I. Tit. 14, s. 2; Tit. 25, s. 13; that if an infant was either a testamentary or the legal guardian, such infant should not take upon him the exercise of his office before his full age, and that in the mean time, another was appointed tutor or curator to the ward."

Where infant appointed guardian, *query*.

It seems reasonable to suppose that the Court of Chancery would, in such a case, appoint some one to act as guardian till further order, and that the person nominated by the father might apply to the Court on reaching the age of twenty-one.

(m) *Corbet v. Tottenham*, 1 Ba. & Be. 59.

(n) MS. note to 14 Vin. Abr. 172, in Lincoln's Inn Library.

We learn from one of the authorities above referred to (o), that a lunatic appointed guardian by testament, might, by the Civil Law, assume the office on recovering his senses; but it appears highly improbable that our Courts would suffer an infant to remain under the care of a person who had been so afflicted.

Each guardian
a complete
guardian.

If there is but one guardian, his office expires with him (p); but where several guardians are appointed by a will, each of them seems to be a complete guardian; for it would be mischievous if, where some refuse to act, the rest should not be able to do anything. A guardian has an authority coupled with an interest, though not an interest of profit; and even though there be no words of survivorship in the instrument appointing the guardians, yet the office belongs to the survivor (q).

The office goes
to the survivor.

Not determin-
ed by marriage
of male ward;
—*secus*, by
marriage of fe-
male.

Testamentary guardianship is not determined by the marriage of a male ward (r); but the guardianship of females is determined by their marriage (s). This indeed is a necessary consequence of the rights which a husband acquires by marriage, with regard to his wife's person and property.

Duty and power
of guardian:

By the statute of 12 Car. 2, c. 24, no new custody is instituted (t); but the office of guardian, as to the duty and power of the place, is left the same as the law before had prescribed and settled of guardian in socage: except that it may be held to twenty-one instead of fourteen; and it may be held by whomsoever the father names, whatever may be his interest in the inheritance (u).

—his interest
the inheritance
no objection.

Remedies
against him.

This new guardian being the same in office and interest

(o) Justin. Inst. Lib. I. Tit. 14, s. 2. *Furiosus vel minor viginti quinque annis tutor testamento datus, tutor tunc erit, cum compos mentis aut major viginti quinque annis fuerit factus.*

(p) Vaugh. 185.

(q) 2 P. W. 107, 108, and 133.

(r) 2 P. W. 103.

(s) 1 Ves. 91.

(t) Vaugh. 179.

(u) *Morgan v. Dillon*, 9 Mod. 135; *Dillon v. Lady Mountcashell*, S. C., 4 Bro. P. C. 306; *Eyre v. Shaftesbury*, 2 P. W. 106.

with the guardian in socage, the ward has the same legal remedies against him (*x*). The office, according to Chief Justice Vaughan, may be refused; but once accepted, it cannot be transferred to others (*y*).

This guardian has the custody not only of the lands descended or left by the father, but of all the lands and goods any way acquired or purchased by the infant; which proves that he derives his interest, not from the father, but from the law, for the father could never give him power or interest of or in that which was never his. Power over purchased property.

The powers of leasing which belong to this statutory guardianship, were discussed in the following case, which is given *verbatim* from Wilson (*z*):—"In ejectment, upon a case stated for the opinion of the Court of Common Pleas, the principal question was, whether a lease for twenty-one years made by the testamentary guardians of an infant, Mr. Spencer, to Parry, was absolutely void or only voidable; it appeared upon the state of this case, that Mr. Spencer himself has done no one act since he came of age, either towards establishing the lease, (supposing it voidable), or to avoid it. Upon the first argument, the Court agreed in one point, viz. that a testamentary guardian by statute, till an infant was twenty-one years of age, and a guardian in socage, till an infant was fourteen, were the same; and, therefore, whatever interest the latter had in lands till the infant was fourteen, the guardian by statute has the same until he is twenty-one. (*The Duke of Beaufort against Berty*, 1 Wms. Rep. 703-4). But as to the main question, whether the lease was void or only voidable, they all, (except *Noel, J.*), doubted much, and gave no opinion: the Chief Justice seem inclined to think the lease was void, from what he said: *Clive, J.*, said he was far from saying it was either void or voidable: *Bathurst, J.*, gave no opinion; but from what he said, he seemed to Power to make leases.

(*x*) *Supra*, p. 38.

see *infra*, c. 12.

(*y*) *Vaugh.* 182; *Spencer v. Earl of Chesterfield*, Ambl. 146; but *Wils.* 129.

(*z*) *Roe d. Parry, v. Hodgson*, 2

think that *whether the lease was void or not at first, it certainly became void or at an end when Mr. Spencer came of age, so could not now be a subsisting lease to give lessor of plaintiff title*: Noel, J., was of opinion that the lease was a good lease, and only voidable by the act of the infant when he came of age, and that he might then affirm it if he thought fit; but said that he should be very willing and ready to depart from this opinion if he should find he had come into it too readily. *Uterius concilium.*

"Hilary 1 Geo. 3 (z). The Court were now all clearly of opinion, that a guardian of an infant cannot make a lease of the infant's lands, and that the lease in this case was absolutely void."

Lease made to last beyond minority, void at twenty-one.

This decision established the rule, that a lease made by a testamentary guardian, to last beyond the minority of the ward, is not valid after the ward attains twenty-one, and is at that time not merely voidable, but absolutely void. If only voidable, it was, in the principal case, sufficient to give the lessor title, as the infant had done nothing since his majority to avoid it; but the Court declared it to be absolutely void. The reason of the decision seems to be contained in the words attributed, in this loose report, to Mr. Justice Bathurst. The Court agreed that the guardian by the statute had the same interest up to the infant's age of twenty-one, that the guardian in socage has up to fourteen. Now the latter has an undoubted (a) right to make a lease for the term of his guardianship, upon which ejectment may be maintained; and it seems to follow, that a statutory guardian has the same right till the infant attains twenty-one. In a case (b) in which *Doe d. Parry v. Hodgson*, was much considered, the Court of King's Bench in Ireland decided in favour of the validity of a lease for the term of the minority only, made by a testamentary guardian.

Lease for period of minority, valid.

(z) *Roe d. Parry v. Hodgson*, 2 Wils. 135. (b) *Shaw v. Shaw*, Vern. & Scriv. 607.

(a) *Supra*, p. 36.

CHAPTER X.

GUARDIANSHIP BY PREROGATIVE.

IN 1718, King George I. referred to all the judges the question, "Whether the education and the care of the persons of His Majesty's grandchildren, then in England, and of Prince Frederick, eldest son of His Royal Highness the Prince of Wales, when His Majesty should think fit to cause him to come into England, and the ordering the place of their abode, and appointing their governors and governesses, and other instructors, attendants and servants, and the care and approbation of their marriages, when grown up, belonged of right to His Majesty, as King of this realm, or not (a)?"

It was resolved by the opinion of ten judges against the other two, (Price, B. and Eyre, J.), that the education and care of all the King's grandchildren, while minors, did belong of right to His Majesty as King of this realm, even during their father's life; and this care was styled by Chief Justice King, a guardianship by prerogative.

The King guardian, by prerogative, of his grandchildren.

During the discussion of the royal marriage act (b), the House of Lords required (c) the opinion of the judges upon the following question:—

"Whether the care and approbation of the marriages of

(a) 12 Geo. 3, c. 11.

State Trials, v. 15, p. 1195; see 1

(b) Fortescue Aland, 400; Harg. Bl. Comm. 225.

State Trials, v. 11, p. 295; Howell,

(c) Parl. Hist. v. 17, p. 387.

the royal family, other than the issue of princesses married into foreign families, does belong to the Kings of this realm?"

The judges present replied, "We are all of opinion that the care and approbation of the marriages of the King's children and grandchildren, and of the presumptive heir to the Crown, other than the issue of princesses married into foreign families, do belong to the Kings of this realm; but to what other branches of the royal family such care and approbation extend, we do not find precisely determined."

Guardianship of
the heir pre-
sumptive;

The majority of the judges in 1718, treated the care and education of the person during minority, as co-extensive with the care and approbation of the marriage when of full age; and the circumstance of King William the Third having appointed a tutor for the Duke of Gloucester, the son of Prince George of Denmark and of the Princess Anne, was frequently referred to in the argument; so that there can be little doubt that, if the terms of the question put to them had extended so far, they would have attributed to the Crown the care and education of the person of the heir presumptive during minority, as fully as the judges on the latter occasion assigned to it the care and approbation of his marriage when grown up.

—of the infant
Sovereign.

It may be observed, that stat. 3 & 4 Vict. c. 52, s. 1, provides, that if, at the demise of Her present Majesty, there shall be issue of Her Majesty, who shall become and be King or Queen of this realm whilst under the age of eighteen years, His Royal Highness Prince Albert, the consort of Her Majesty, shall be the guardian, and shall have the care, tuition, and education of such issue, until such issue shall attain the age of eighteen years, and shall, till such age, have the disposition, ordering, and management of all matters and things relating thereto.

CHAPTER XI.

GUARDIANSHIP BY APPOINTMENT OF A COURT OF
EQUITY.

THE Courts of Equity exercise a jurisdiction for the appointment of guardians. The origin and nature of this jurisdiction has been discussed by Mr. Hargrave in the following note (a) :—

“ The *second* is guardian by appointment of the Lord Chancellor. How this jurisdiction was acquired by him is not easy to state. The usual manner of accounting for it appears to us quite unsatisfactory. See Gilb. Eq. Rep. 172. Saying that his jurisdiction over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a *separate commission* under the sign manual, but there is not any such to warrant the latter. The writs of *ravishment of ward* and *de recto de custodiâ* prove as little: for were not these returnable in the Courts of Common Law, or though they had not been so, how doth a jurisdiction to decide between contending competitors for the right of guardianship prove a power of appointing a guardian, where it happens that one is wanting? The writs *de custode admittendo*, in the Register, only relate to guardians *ad litem*. Reg. Br. Orig. 198. a. The assertion, that the appointment of guardians belonged to the Chancellor before the erection of the Court of Wards, re-

Hargrave's note
on the Chancel-
lor's jurisdic-
tion.

(a) Harg. n. (16), to Co. Litt. 88. b.

mains to be proved ; or at least we, after a diligent search, do not find any authority in print. The passage referred to in *Fleta*, and the doctrine in *Beverley's case* 4 Co., by no means warrant the use made of them ; for in neither is any notice taken of *infants*. Though the care of infants, as well as of idiots and lunatics, should be admitted to belong to the Crown ; yet something further is necessary to prove that the Chancellor is the person constitutionally delegated to act for the King. It is no wonder, therefore, that Lord Chancellor Hardwicke took occasion to disapprove of comparing the Court's jurisdiction over infants with that over idiots and lunatics. 2 Atk. 315. As to the writs relative to the appointment and removal of guardians in the Register, they merely relate to *suits* : which is of very different consideration from *general* guardians. See Index to Reg. Brev. Orig. tit. *Custodes*. Nor will it answer the purpose, to attempt including guardianship in the idea of *trusts*, which are the peculiar objects of equitable jurisdiction, as it must be seen that this is an over-strained refinement ; for though guardianship in the *common* acceptation of the word *trust*, may be properly so denominated ; yet it as surely is not so in the *technical* sense in which our lawyers use the word, and Chancery exercises a jurisdiction over trusts ; for, in this latter, trusts are invariably applied to *property*, especially *real estates*, and not to the *person*.—However, we must not be understood by these remarks to controvert the *present* legality of the jurisdiction thus exercised in Chancery over infants ; our intent being simply to shew, that such jurisdiction is not, *as far as yet appears*, of *ancient date* ; and that, though it is now unquestionable, yet first at it seems to have been a usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Our conjecture, as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, which have been obligingly communicated to us by a respectable gen-

tleman in the Register's office. According to these, the first instance to be found of a guardian appointed by the Chancellor, *on petition without bill*, was in 1696, in *the case of Hampden*. But since that time, the Court of Chancery hath exercised the power of appointing guardians, without its being once called into question. Therefore in the case of *Lady Teynham* against *Mr. Lennard*, which was heard on an appeal to the Lords in 1724, the counsel for the respondent very properly stated it as a thing fixed, that the Lord Chancellor was intrusted with that part of the Crown's prerogative which concerned the guardianship of infants. 1 Brown Cas. in Parl. 544. Under the same idea too, the last marriage act refers to the Chancellor for the appointment of a guardian to consent to marriage, where the infant is without a guardian and the mother is not living. 26 G. 2, c. 33, s. 11."

Mr. Fonblanque has thus replied to Mr. Hargrave's argument (a):—

"The doubt intimated by the learned annotator, as to the rightful origin of this point of jurisdiction exercised in our Court of Chancery, must necessarily, with reference to his professional claims, have materially influenced the judgment and opinions of his readers; and it appearing to me to be of some consequence to rescue a branch of jurisdiction so salutary in its exercise, from the imputation of having originated in usurpation, I cannot refrain from submitting the observations which have occurred to me upon it. It is observable that Mr. H. rather relies on the insufficiency of the arguments adduced in support of the jurisdiction, than on any positive fact or reasoning against it. And in so considering the subject, he has certainly a considerable advantage over his opponents. By some who maintain the jurisdiction of the Court in this particular, it is said, that upon the abolition of the Court of Wards, the care which the Crown was

(a) 2 Fonb. Tr. Eq. 228, n. 5th ed.

bound to take, as guardian of its infant tenants, was totally extinguished in every feudal point of view; but resulted to the King in his Court of Chancery, together with the protection of all other infants in the kingdom. 3 Bla. Com. 426, 427. From this it might be inferred, that the jurisdiction of the Court of Wards and Liveries was protective of infants in general; whereas the statute of Henry VIII. by which the Court of Wards was erected, expressly confines the jurisdiction of that court to wards of the Crown; and it is scarcely necessary to remark, that, when a new court is erected, it can have no other jurisdiction than that which is expressly conferred; for a new court cannot prescribe. 4 Inst. 200. But if the statute (32 H. 8) does not confer a general jurisdiction in the case of infants, but merely a particular jurisdiction as to wards of the Court, it should seem to follow that the general superintendence of the Crown over infants, as *pater patriæ*, if it existed at common law, was not affected by the statute, except in those cases to which it expressly refers. What those cases were, are particularly enumerated by the statute, and also in the instructions to the Court of Wards and Liveries, prefixed to Ley's Reports. See also Reeve's Hist. Eng. Law, vol. iv. 259. That in every civilized State, such a superintendence and protective power does somewhere exist, will scarcely be controverted. That if not found to exist elsewhere, it may be presumed to vest in the Crown, will not, I think, be denied. Assuming, therefore, that the general superintendence of infants did originally vest in the Crown, I shall conclude, that, *ed ratione*, it is now exercised in the Court of Chancery as a branch of its general jurisdiction. But it has been asked, Why, if no particular warrant be necessary to the Court in the care of infants, is a separate commission under the sign-manual necessary to authorize the Chancellor's jurisdiction in the case of idiots and lunatics, which are also referred to the head of general protection? The answer is,

that the custody of the persons and lands of idiots and lunatics, at least of such as held lands, was not anciently in the crown, but in the lord of the fee. The 17 Ed. 2, c. 9, (or, as Lord Coke and others suppose, an earlier statute, see 2 Inst. 14), gave to the King the custody of idiots, and also vested in him the profits of the idiot's lands during his life; by which the Crown acquired a beneficial interest in the lands; and as a special warrant from the Crown is in all cases necessary to the grant of its interest, the separate commission which gives the Chancellor jurisdiction over the persons and estates of idiots, may be referred to such consideration. And, with respect to the care of lunatics, the statute of 17 Ed. 2, c. 10, enacts, that the King shall provide that their lands and tenements shall be kept without waste. The statute confers merely a power which cannot be considered as included within that general jurisdiction conferred long before by the Great Seal; and, therefore, for the delegation of this new power, a separate and special commission was necessary. But see the case of *Oxenden v. Lord Compton*, 2 Ves. Jun. 71, in which Lord Loughborough, C., is reported to have stated, that the statute 17 Ed. 2, c. 10, is not introductive of any new right in the Crown. Others who have attempted to support the general jurisdiction of the Court of Chancery upon this point, have resorted to the circumstance of writs of ravishment of ward, and *de recto de custodia* issuing out of Chancery; and others have attempted to support it upon the notion of a guardianship being a trust. Mr. Hargrave has, in my opinion, given a sufficient answer to the first class of cases, namely, of the writs of ravishment of ward, &c. by observing, that those writs are returnable in courts of common law; and, with respect to the idea of a guardianship being a trust, though I think it founded so far at least as to entitle any Court of Equity to call upon the guardian to account, it does not, in my opinion, touch the

point which respects the right of a general and exclusive superintendence over the interests of infants in the Court of Chancery. If such a power be a mere trust, every Court of Equity has a concurrent jurisdiction upon the subject; but *query*, if the Court of Exchequer, as a court of equity, has such concurrent jurisdiction? It may indeed appoint a guardian *ad litem* to manage the defence of the infant, if a suit be commenced against him; a power which is incident to every court of justice. It may also, when the interest of an infant comes before it judicially, provide for its security and protection; but whether it can appoint a guardian to an infant for general purposes, where none is appointed; or whether it can, in an equal extent, exercise that protective power which watches over the interest of infants in the Court of Chancery, is a point which I do not find any where solemnly determined, and which, with reference to the fiction upon which the equitable jurisdiction of the Court of Exchequer is founded, I should think at least doubtful. That the general jurisdiction exercised by our Court of Chancery, in the cases of infants, flows from its general authority, is further evinced by the concurrent jurisdiction exercised by the Master of the Rolls, and by the appellate jurisdiction of the House of Lords, neither of which have any jurisdiction in the case of idiots and lunatics. Upon the whole, I submit, that the superintendence and protective jurisdiction of the Court, in the case of infants, is a delegation of the duty of the Crown; that its general jurisdiction was not even suspended by the statutes of Henry VII. erecting the Court of Wards and Liveries. That the case of idiots and lunatics is distinguishable; the jurisdiction exercised in Chancery, as to the first, being the grant of an interest, and, in the latter, the delegation of a power conferred by Parliament." *De Manneville v. De Manneville*, 10 Ves. 52.

Opinion of
Lord Eldon.
Principle of the
jurisdiction.

In the case just cited, Lord Eldon says that Mr. Fonblanque has stated the principle very correctly; and he con-

curs with Lords Hardwicke (a) and Thurlow (b) in the opinion, that the State must of necessity place somewhere a superintending power over those who cannot take care of themselves, and that the Court represents the King as *parens patrie*. The Court, he says elsewhere (c), has not the means of acting, except where it has property to act upon; because it cannot take on itself the maintenance of all the children in the kingdom. It is not, however, from any want of jurisdiction that it does not act; but from a want of means to exercise its jurisdiction, by applying property for the use and maintenance of the infants (d).

It can be exercised only where there is property.

Lord Redesdale (e) considered it to be a constitutional principle, that all powers in the administration of justice, which are necessary in themselves, are vested in the Crown. He thought it a strong proof of the Crown's ancient superintendence of infants, that the City of London claims as an immemorial right, and a right which must have been derived from the Crown, the care of orphans (g). That many parts of the constitution had an origin equally uncertain. That the right of the Court to act in respect of property and the maintenance of children, is quite distinct from the question as to the person. That the jurisdiction of Courts of Equity extends to the care of the person, as far as is necessary for protection and education. That the Justices of Wales exercised this jurisdiction in their Courts of Chancery,

Opinion of Lord Redesdale.

(a) *Butler v. Freeman*, Ambl. 301.

(b) *Powell v. Cleaver*, 2 Bro. C. C. 499.

(c) *Wellesley v. Duke of Beaufort*, 2 Russ. 21.

(d) Lord Cottenham is reported to have said in the debate on the Custody of Infants' Bill, July 18, 1839, that the Court of Chancery has the general jurisdiction over

the property of infants, and where the infant has property, it exercises a jurisdiction over the infant: but that court has no power in ordinary cases. If £100 be settled on the child, then the Court has the power, but not else.

(e) *Wellesley v. Duke of Beaufort*, 2 Bligh. N. R. 124; See 2 Mod. 141.

(g) *Supra*, p. 48.

under a statute of Henry VIII.; and the Chancellor of Durham without any record of the origin of his authority, but without question. He thought that if there was a suit respecting property in the Court of Exchequer, as a Court of Equity, to take care of the property belonging to an infant, the Court of Exchequer would exercise that jurisdiction, as incident; that is, it would take care that the property which was to be administered under its jurisdiction, should be properly so administered.

Power of Court
of Exchequer.

The Court of Exchequer does (g) exercise, like the Court of Chancery, a general power of appointing guardians and ordering maintenance for infants, where there is a suit pending.

The jurisdiction
coeval
with necessity.

While the military tenures existed, the law provided, in most cases, for the guardianship of children who had real property. On the abolition of those tenures, the father was empowered to appoint guardians for his children; but where he failed to exercise his power, the children were left unprotected. From the period immediately succeeding the abolition of the military tenures, that is, from the earliest period at which any additional protection could be at all generally desired, we find that the Courts of Equity have interposed; and this seems a sufficient constitutional foundation for the practice, even without the aid of arguments derived from still more ancient times (h).

(g) *Evans v. Massey*, 1 Yo. & J. 196; *Hall v. Storer*, 1 Yo. & C. 556; *Symons v. Symons*, 2 Yo. & C. 1; *Whitlock v. Finch*, 3 Yo. & C. 724; see *Ex parte Whitehead*, 2 Yo. & J. 243.

(h) Among the ancient bills in Chancery, prefixed to Vol. I. of the Calendar of Proceedings in Chancery during the reign of Queen Elizabeth, published by the Record Commission, may be found at p. 1,

a complaint, (A. D. 1392), by Thomas, Duke of Gloucester, that he has been ousted of the possession of certain lands, the custody of which had been committed to him by the King, as guardian in chivalry. At p. 15, (about A. D. 1422), the committee of a city orphan complains that the infant, having affianced himself to the daughter of the plaintiff, has been drawn away by his own mother, and is detained with a

Where a suit is instituted for the direction of the Court in relation to the estate or person of an infant and for his benefit, or for the administration of property in which he is interested, the infant, whether he be plaintiff or defendant, becomes a ward of court the instant that the bill is filed (i). In this character, he is considered to be under the particular care of the Court; and he is equally entitled to its protection, whether he is under the immediate tutelage of a father, a statutory or common law guardian, or of a guardian appointed by the Court; for the Court does not assume to itself the actual guardianship of infants.

What constitutes ward of court.

Persons desiring to call in the authority of the Court for Expedient for

view to marry him to another person, and prays that the infant may be produced. At p. 31, (temp. Hen. VI.), a man complains that W. A. broke into his house at midnight and took away Anne, his daughter, and one of his heirs, being within the age of twelve years and in his ward, whose marriage of right to him pertained, and wedded her against the will of him, her father, and all her friends, thereby preventing the plaintiff from having the profit and avail of her marriage, for which he might have had 200 merks in money. At p. 86, (8 Edw. 4), it appears that two infant wards of the King being detained by Sir James Haryngton and Sir John Hudelston, the detainers were committed to the Fleet by the Chancellor, by advice of the justices, serjeants at law, the attorney, and others *de consilio domini regis*, in the Exchequer Chamber. All these cases are prior to the establishment of the Court of Wards and Liveries.

No inference can be drawn from the irregular proceedings of ancient times, when grievances of every kind were pressed upon the Chancellor's attention. In the reign of Queen Elizabeth, (Calendar, Vol. 1, p. 406), we find the case of *Higson v. Worlyche*, in which a messuage, cottage, and land, late the estate of N. R. deceased, had upon his death, descended to R. R. his son, a minor, and the plaintiff filed a bill, claiming to be his guardian as uncle by the mother's side. In the case of *Huberd v. Perle*, (Id. p. 417), the wardship of an infant was claimed in respect of two closes of land held of the plaintiff by knight's service. There are also several bills against guardians in socage or by custom, for an account of issues and profits. See *Walford v. Mott*, A. D. 1590, (Id. p. 293); *Sharp v. Tull*, A. D. 1586, (Id. p. 96); *Sewell v. Barrett*, A. D. 1594, (Id. p. 89).

(i) *Hughes v. Science*, Appendix I.; Ambl. 302, n.

making a ward
of court.

the protection of an infant, have resorted to the expedient of settling a small sum of money upon him, in order to give the Court jurisdiction, (it seems that £100 would be sufficient), and of filing a bill for the due administration of the property (*k*).

The mere filing of a bill against an infant, unless it be for the purposes mentioned above, does not make him a ward of Court (*l*).

Court appoints
guardian,
where suit
pending.

The Court of Chancery or the Court of Exchequer will appoint a guardian for infants who have no father or testamentary guardian, where a suit is pending for the administration of property in which the infants are interested; or the Court of Chancery will appoint without suit, upon a petition being presented for that purpose (*m*). In the latter case, however, the infants do not become wards of Court by the mere appointment of a guardian.

On petition
without suit.

Mr. Hargrave has stated (*n*) that the first case to be found of a guardian appointed by the Chancellor, on petition, without bill, was in 1696, in *the case of Hampden*; and the practice is now fully established (*o*). The present writer is not aware of any instance of the appointment of a guardian by the Court of Exchequer, on petition without suit.

Right of guar-
dianship deter-
mined on pe-
tition.

Where a testamentary guardian has not acted, and declines to act, a guardian may be appointed on petition (*p*). The right to guardianship may also be determined on petition (*q*).

(*k*) See Law Magazine, Vol. 24, Dick. 360; *Ex parte Salter*, 2 Dick. p. 279. 769; S. C. Bro. C. C. 500; *Corbet*

(*l*) *Hughes v. Science*, Appendix I. *v. Tottenham*, 1 Ba. & Be. 60.

(*m*) See Seton on Decrees, 277, 350; *O'Keeffe v. Casey*, 1 Sch. & Lef. 106. (*p*) *Ex parte Champney*, 1 Dick.

(*n*) *Supra*, p. 97.

(*q*) *Eyre v. Countess of Shaftes-*

(*o*) See *Mellish v. De Costa*, 2 Atk. 14; *Villareal v. Mellish*, 1 Atk. 14; *Villareal v. Mellish*, 1 West, 299; S. C. 2 Swanst. 533, *parte Earl of Ilchester*, 7 Ves. 348; n.; S. C., *Ex parte Birchell*, 3 Atk. 813; *Ex parte Champney*, 1

Where a suit is pending, a guardian of the *person only* is appointed, the estate being under the direction of the Court.

Guardian of person;

Where no suit is pending, the guardian is appointed for the *person and estate*. Unless the petition for a guardian alleges that the infant has some estate, real or personal, or is a petition under the Marriage Act (*r*); there being no interest to protect, and no object which the Court can take notice of, no guardian will be appointed (*s*).

—of person and estate.

Guardian not appointed where no estate.

Where a guardian has been appointed by the Court, either with a suit pending or without suit, his rights and duties with regard to the person of the infant are the same with those of other guardians, and continue during minority.

Guardian appointed by Court.

His powers as to person;

With regard to the infant's property, it seems that formerly, where the infant was entitled to real estate, the appointment

—as to property.

of a guardian was thought sufficient without the appointment of a receiver; that is, a guardian in the nature of a receiver was appointed (*t*), and where a separate receiver was thought necessary, an order for a receiver has been made, on petition (*u*). But it has since been held that the Court has no jurisdiction to appoint a receiver unless upon a bill filed (*x*). Lord Eldon said, in *Ex parte Mountfort*, that, if a receiver so appointed were to embezzle the rents, it was questionable whether the Court would have jurisdiction to commit him. The same doubt would of course apply to a guardian appointed without suit; and where there is a suit, it is usual to appoint a receiver for the management of the property (*y*), and the receiver is seldom the same person with the guardian, although it has happened, that, where there were three guar-

Formerly was in nature of a receiver.

Receiver can be appointed on bill only.

Guardian appointed without suit, cannot receive.

(*r*) See the chapter on Marriage, *infra*. (*s*) *Ex parte Whitfield*, 2 Atk. 315; *Anon.* 1 Atk. 489; S. C. 1

(*t*) *Ex parte Becher*, 1 Bro. West. 347; *Ex parte Mountfort*, C. C. 555. 15 Ves. 445.

(*u*) See Set. Dec. 279; *Re Man*, Ib. 382; *Re Patton*, Ib. 283. (*y*) A receiver may be appointed, though not prayed for by the bill.

(*x*) *Ex parte Odel*, cited 2 Atk. 115. MS. case, cited 2 Madd. Ch. Pr. 290.

- dians, one of them was also appointed receiver. It is not easy to see any objection, in principle, to the union of the offices of guardian and receiver in the same person. Generally speaking, where there is an application for a guardian, maintenance is also applied for; and the guardian merely receives what is awarded by the Court for maintenance, and applies it for the infant's benefit. If there is a suit pending, the guardian receives this allowance from the receiver or some other officer of the Court. If there is no suit pending, an executor or trustee or other person in whose hands the property of the infants may be, is safe in paying to the guardian, if he thinks fit, the annual sum which has been ordered by the Court; or if the whole proceeds of a small real estate have been ordered to be applied for maintenance, the tenants are safe in attorning to the guardian. But it has been observed by Sir L. Shadwell, V. C. (y), that the order of the Court for maintenance out of an infant's freehold estate, discharges the party making the payment, to the extent only of the allowance made. If an executor or administrator, or tenants, should resist the guardian's authority, it does not appear that he could compel payment without filing a bill.
- The guardian cannot grant leases of the infant's estate, without the sanction of the Court, which should be applied for on petition; when a reference will be granted to inquire, whether it will be for the infant's benefit that such leases should be made (z).
- The common order is (a) for a reference to the Master to approve of a proper person or persons to be appointed guardian or guardians of the person, or, if there be no suit, of the person and estate, of the petitioner during his minority; for which purpose the Master is to be attended by all proper par-
- Merely receives maintenance.
- It may safely be paid to him.
- Whether he could enforce payment, *query?*
- Cannot grant leases.
- Common reference for guardian and maintenance.

(y) *Ex parte Starkie*, 3 Sim. 339. (a) Set. Dec. 277; and see Appendix II.

(z) See 1 W. 4, c. 65.

ties; and he is to mention the infant's age and fortune, and relatives; on what evidence or grounds any persons are approved of as guardians; what maintenance should be allowed for the infant, from what past period and out of what fund.

Where a report is made under an order of reference for the Master to approve of a guardian, make an allowance for maintenance, and the like; exceptions do not lie to such a report (b), for the Master only approves of persons as guardians, and does not appoint them; but the report is stated, and brought before the Court by petition; and the Court will confirm or vary it, according as it coincides in or differs from the opinion of the Master. Such reports have been confirmed on motion (c), but the practice is irregular (d). But exceptions will lie to the Master's report of the appointment of a receiver (e); for the Master actually appoints that officer, and does not merely approve.

Proceedings.

No exception to report.

Confirmed on petition.

Exceptions to appointment of receiver.

A receiver having been appointed of the estates of infant plaintiffs, and some further freehold property having afterwards descended to them, an order was made on their petition, that the receiver already appointed, should be appointed receiver of the rents and profits of the real estate which had descended to the said plaintiffs, with the usual direction as to the allowance of a salary to the receiver, who was directed to give further security to be allowed by the Master duly to account; and the tenants were to attorn, and to pay their rents in arrear and growing rents, to such receiver (g).

New appointment of receiver for additional property.

It has been laid down, that, where guardians are approved of, it should be stated (h) whether such guardians are willing to enter into a recognisance before the Master, duly to ac-

Law as to recognisances.

(b) *Price v. Shaw*, 2 Dick. 732; (c) See Set. Dec. 321.
Ex parte Nicholls, 1 Bro. C. C. 877. (g) *MS. case*, cited 1 Smith's
 (e) *Cavendish v. Mercer*, 5 Ves. Ch. Practice, 632.
 195, n. (h) 1 Turn. Pract. 397; 1 Turn.
 (d) *Greenwell v. Greenwell*, Id. & Ven. 676; Seton on Decrees,
 199. 280, 284.

count for such part of the infant's fortune as shall come to their hands, as the Court shall direct; and that the guardian must enter into such recognisance; that it must be with two sureties (*k*), and that it must be conditional, that he shall not permit or suffer the infant to marry without the consent of the Court. Under special circumstances, the form has been altered, so as to provide only against the marriage of the infant without leave of the Court, by the consent, privity, or contrivance of the guardian. It has also been stated that the recognisance should be vacated when the infant comes of age, and the guardian has settled his accounts with him, and that an order for that purpose will be made on application to the Court by a petition.

But according to the modern practice, no recognisance is, in fact, entered into by guardians of the person, appointed where a suit is pending.

Modern practice as to recognisances.

Guardians of the person and estate, appointed on petition without suit, are required to enter into recognisances to account, but without any restriction as to marriage. The personal recognisance of the guardian is sometimes deemed sufficient, but it is more usual to take sureties. The recognisances extend to the whole amount of the capital of the infant's personal estate, and two years' income of his real estate, if any. The recognisances ought to be vacated when the infant comes of age. There is scarcely any instance in modern times of an account being taken in the Master's office against a guardian without suit; but it has been laid down that guardians and receivers are obliged to account on application by petition or motion, being bound by recognisance to account regularly, or when called on, and being considered as officers of the Court (*l*).

Where guar-

The Court will appoint a guardian not only without suit,

(*k*) *Dr. Davis's case*, 1 P. W. As to the manner of taking accounts in Ireland, see Gen. Rules, 698; 2 P. W. 112.

(*l*) *In re Burke*, 1 Ba. & B. 74. Aug. 6, 1804; 2 Scho. & L. 732.

but without a reference, where the property of the infant or infants is small, as where it consists of a pension of £15 during minority (*m*); but this exemption has been refused to infants whose property did not exceed £1500 (*n*), and to an infant whose property consisted of a rent-charge of £150 per annum (*o*); it has, however, been allowed in the case of an infant entitled to freehold property of the annual value of £80 (*p*). Guardians appointed under such circumstances must give the usual security to account.

Infants above the age of fourteen have, on various occasions, been allowed to choose their guardians in court, and the Court has appointed such persons to be guardians without a reference (*q*). But where an infant above the age of fourteen by deed appoints a guardian for himself, if he has no socage lands, it seems that the appointment will be bad; and even if he has socage lands, such appointment will not supersede the duty and authority of the Court, and a reference for a guardian will be ordered on petition (*r*).

Although a man cannot appoint testamentary guardians for a natural child; yet, if he nominates guardians by his will, the Court will generally, without reference, grant the guardianship to the persons whom he has nominated, or to such of them as consent to undertake the office, and are not objected to (*s*). But in the case of *Elwes v. Const*, Sir John Leach, V. C., held, that a reference was necessary (*t*). But

dian appointed without reference.

Where chosen in Court.

Reference notwithstanding appointment of guardian by infant.

Guardian nominated for natural child.

A firm will not be appointed.

(*m*) *In re Jones*, 1 Russ. 478; see 16 Ves. 287. (*r*) *Ex parte Watkins*, 2 Ves. 470; and *Mr. Locker's case* there cited; *Curtis v. Rippon*, 4 Madd. 462.

(*n*) *Ex parte Wheeler*, 16 Ves. 286. (*s*) *Peckham v. Peckham*, 2 Cox, 46; *Ward v. St. Paul*, 2 Bro. C. C. 583; *Chatteris v. Young*, 1 J. & W. 106; *Barry v. Barry*, 1 Molloy, 210.

(*o*) *Ex parte Janion*, 1 Jac. & W. 395. (*t*) 1 Madd. Ch. Pr. 435; where it is suggested that this was done

(*p*) *Ex parte Jackson*, 6 Sim. 212.

(*q*) *Ex parte Edwards*, 3 Atk. 519; *In re Man*, Seton on Decrees, 282; see p. 78, *supra*.

where a man appointed "the house of Messrs. A., B. & Co." to be guardians to his natural children, the Master of the Rolls said that he could not appoint a partnership guardians, and referred it to the Master to approve of a guardian (*u*).

Whether father
of illegitimate
child will be
appointed;

As the Court will not appoint a guardian for an infant who has no property (*x*), a putative father will not be appointed guardian of his illegitimate child, having no property, unless he makes a settlement upon him (*y*), and he has no absolute right, under any circumstances, to claim the guardianship. A woman devised her real estate to her natural daughter, and named her own sister executrix and guardian, and died. The father owned the child, and took her from school. In a contest which arose between the father on the one hand, and the mother's sister and afterwards the executrix of the sister on the other, the Master reported that the executrix was a proper person to have the care of the child. But as it appeared that the father had shewn much zeal for the interests of the child, the Court, although it ordered her to be placed at a proper school, yet did not think fit to take the care of her from him, but directed the sum allowed for her maintenance and education to be paid to him; upon condition, however, that he should pay the costs of the application on behalf of the executrix of the infant's aunt, and should allow her to have proper access to the infant (*z*).

—whether mother.

In another case (*a*), where illegitimate daughters took considerable fortunes under their father's will, the mother applied for the office of guardian, but another person was appointed.

Informal nomi-

A father having nominated a guardian for a legitimate

because the Duke of Norfolk, a Roman Catholic, was one of the persons nominated. (*z*) *Ord v. Blackett*, 9 Mod. 116; Reg. Lib. 1718, B. fo. 245; Reg. Lib. 1724, B. fo. 23; see p. 67,

(*u*) *De Masar v. Pybus*, 4 Ves. *supra*. 644.

(*x*) *Supra*, p. 105.

(*y*) 1 Madd. Ch. Pr. 432, n.

(*a*) *Courtois v. Vincent*, Jac. 268.

child, by a will not duly executed for that purpose, the person so nominated was appointed guardian by the Court of Exchequer without a reference (*b*). nation by father confirmed.

Where guardians are appointed by the Court, the office determines by the death of one of them, and does not, like testamentary guardianship, survive to the others (*c*); but the survivors will be appointed without a reference (*d*). The office determines by death of any.

On the marriage of a mother or other female who has been appointed guardian to an infant, it is a matter of course to appoint a new guardian (*e*); for she is no longer *sui juris*, and has become liable to be controlled by her husband; but she is at liberty to go before the Master to propose herself as guardian. It seems to follow from these principles, that the marriage of a female who is one of several guardians, would put an end to the whole guardianship. By marriage of female guardian.

Where a married woman is appointed guardian, payment of money will be ordered to her upon her separate receipt (*g*). Payment to separate receipt of feme guardian.

Persons residing out of the jurisdiction, will not be appointed guardians; for there must be some one answerable to the Court (*h*). Where infants reside beyond the jurisdiction, some one residing in this country will be appointed to act as guardian, even though the father is alive; and the allowance for maintenance will be paid to such guardian (*i*). Guardian must be resident within jurisdiction.

It has been said, that if a minor above the age of fourteen, being free from custody, is not willing to receive a new guardian, no court would appoint a guardian unless *ad litem* (*k*). But there is no authority for this statement, and the inconvenience would be so great, that where there is property, the Whether guardian given *in vivo* after fourteen.

(*b*) *Hall v. Storer*, 1 Yo. & C. 556. (*h*) *Logan v. Fairles*, Jacob. 193.

(*c*) *Bradshaw v. Bradshaw*, 1 Russ. 528. (*i*) *Ibid.*; and see *Stephens v. James*, 1 M. & K. 627; *Latham v. Hall*, 7 Sim. 141.

(*d*) *Hall v. Jones*, 2 Sim. 41. (*k*) *Harris on Just. Inst. Lib. 1, tit. 23, s. 2, cited 2 Byth. Prec.*

(*e*) *Anon.* 8 Sim. 346; *In re Gornall*, 1 Bea. 347. (*g*) *Wallis v. Campbell*, 13 Ves. 517. 398, n., refers to *Vaughan*, 185.

Court would undoubtedly take care that the infant was properly educated, even after the age of fourteen (*l*).

Little attention
paid to mother
or guardian in
socage.

Notwithstanding the statement of Lord Vaughan, that guardianship in socage cannot be declined, and notwithstanding Lord Hardwicke's account of the mother's natural guardianship, the Courts, in appointing a guardian, attach very little practical importance to guardianship in socage or to the mother's rights, and they are not prevented from directing a reference for a guardian, by the existence of a guardian in socage, or of a mother, or of a person who unites both characters. If, indeed, a mother or other person claiming as guardian in socage should oppose the petition for a guardian, probably the Court would not interfere with the guardianship of an infant under fourteen, unless misconduct were imputed to the guardian.

The mother and other near relatives have the first claim upon the attention of the Master in his selection of a guardian.

Grandmother
preferred to un-
cle.

In a certain case (*m*), exceptions were taken to the Master's report; because he had approved of the maternal grandmother, as guardian of the infant plaintiffs, (their father having intimated a wish to that effect), preferably to a paternal uncle and another friend on the father's side, who was also the father's executor. The two last would have received the children into their houses without any expense to the children, which the grandmother did not propose to do. They were also in more prosperous circumstances; and it was urged that it would be more beneficial for the infants to have one of them for a guardian. Lord Hardwicke said, "I cannot help that; the law in this case would make her guardian of socage land, like a father or mother. She is *loco*

(*l*) Cowell, Inst. tit. 23, s. 4.

(*m*) *Hunter v. Governor Macrae*, 17 Oct. 1738; 5 Hill MSS. 46.

parentis, and nature speaks the thing. The exception must be overruled."

Where testamentary guardians are desired by the will to take the advice of a certain person in the education of the infant, and such person is attainted; this superintendency devolves upon the Great Seal, which may appoint new advisers (n).

On attainder of adviser, Great Seal appoints.

Where a man devised the guardianship of his child to his wife and A., but if his wife should marry again, then the wife and A. to fix upon another guardian; the wife did marry again, but would not agree with A. to choose another guardian; it was resolved, that it devolved upon the Court of Chancery to appoint a guardian (o).

So on disagreement between persons intrusted with choice.

In the case of *Lady Teynham v. Lennard* (p), a man had married a Roman Catholic lady, and died leaving her *enccinte* of a son. On his death bed, he expressed a wish that his own father should bring up the child as a Protestant. When the boy was in his seventh year, the grandfather, to whose estates he was heir-apparent, applied to the Court to remove the infant from his mother. Lord Chancellor Macclesfield, considering it incumbent on the Court to take care that the infant was brought up as a Protestant, appointed as guardian a person named by the grandfather, who was very old and unwilling to take the trust upon himself. The House of Lords, on appeal, appointed the grandfather guardian; because a stranger was not so proper to be intrusted with the office.

Where grandfather preferred to mother.

The Court never appoints a guardian for a female infant after marriage, nor discharges an order for a guardian be-

Guardian not appointed for female after marriage.

(n) *Duke of Beaufort v. Borty*, 1 P. W. 706. (p) 4 Bro. P. C. 302; S. C. cited 2 Atk. 315; Barnard. 139.

(o) *Darcy v. Lord Holderness*, Trin. 1725, by Lord King, 1 P. W. 704, n. The report in 9 Mod. 40, is incorrect. *Supra*, p. 84.

cause of marriage (*q*) ; probably, because the marriage of a female, if valid of its own force supersedes guardianship.

The Court of Chancery also has the power of appointing guardians of the person under the Marriage Act, for the single purpose of consenting to the infant's marriage (*r*).

(*q*) *Roach v. Garvan*, 1 Ves. 160.

(*r*) See the Chapter on Marriage, *infra*.

CHAPTER XII.

JURISDICTION OF COURTS OF EQUITY OVER GUARDIANS.

THE Courts of Equity will not only appoint guardians where there are none already, but will also, if the infants be made wards of Court by the institution of a suit, assist, control, and, in many cases, remove existing guardians upon cause shewn. General jurisdiction.

The principles upon which they act in all matters belonging to this jurisdiction, (except those relating to marriage, which require a separate discussion), are now to be considered.

The decisions of the Courts have been influenced from time to time by the state of the legislative provisions regarding the holders of certain opinions on Religion: of these provisions, therefore, a brief notice must be given (*a*). Statutes as to religion.

By stat. 9 & 10 W. 3, c. 82, persons educated in or having at any time professed the Christian Religion within this realm, who should by writing, printing, teaching, or advised speaking, deny the Trinity, or the divine authority of the Scriptures, or the truth of the Christian Religion, were, upon a second conviction, disabled, (among other things), from being the guardians of children. The stat. 53 Geo. 3, c. 160, repealed this enactment, so far as regards the denial of the Trinity. Denying the Christian religion.

(*a*) See also p. 88, *supra*.

Popish education forbidden;

By the old laws against Papists (*b*), they were totally disabled from giving their children any education in their own religion, either in England or abroad.

—but now tolerated.

But by stat. 31 Geo. 3, c. 32, Roman Catholic schools are, under certain regulations, tolerated in this country.

Sending child abroad for Popish education.

Blackstone gives the following account of the enactments against sending children abroad to be educated as Roman Catholics (*c*):—

Penalties.

“It is provided (*d*) that if any person sends any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending shall forfeit £100 (*e*); which shall go to the sole use and benefit of him that shall discover the offence. And if any (*g*) parent or other shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in any priory, abbey, nunnery, popish university, college or school, or house of jesuits or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion; or shall contribute anything towards their maintenance when abroad, by any pretext whatever;—the person both sending and sent shall be disabled to sue in law or equity; or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life.”

Disabilities.

Relief act.

It is enacted by a stat. 31 Geo. 8, c. 32, s. 4, that no

(*b*) See Butler n. (2), to Co. c. 5.
 Litt. 391. a. (*e*) 11 & 12 Wm. 3, c. 4.
 (*c*) 1 Bl. Comm. 261. (*g*) 3 Car. 1, c. 2.
 (*d*) Stat. 1 Jac. 1, c. 4, 3 Jac. 1,

person who shall take and subscribe the oath therein appointed to be taken and subscribed in manner thereby required, shall be presented, indicted, sued, impeached, prosecuted, or convicted, in any Civil or Ecclesiastical Court of this realm, for being a Papist, or reputed Papist, or for professing or being educated in the Popish Religion, or for hearing or saying Mass, or for being a Priest or Deacon, or entering or belonging to any Ecclesiastical order or community of the Church of Rome, or for being present at, or performing or observing any rite, ceremony, practice, or observance of the popish religion, or maintaining or assisting others therein.

Mr. Justice Coleridge remarks in a note upon the passage lately cited from Blackstone, that it is commonly stated that by the 31 Geo. 3, c. 32, the penalties there mentioned are repealed in favour of any Roman Catholic taking the oath therein prescribed; but that he can find no such repeal in that or any other statute. its effect.

Care will be taken that the property of the infant shall not suffer by the acts of his guardian.

Where the guardian must give security to account.

Lord Coke (*A*), and Lord C. J. North (*i*), bear witness to the ancient practice of taking good security from guardians where there was any doubt of their sufficiency (*k*).

A bill was brought (*l*) by the grandfather of an infant, as next friend, against her guardian in socage, for an account of her personal estate, and of the rents of her real estate. The bill charged that the defendant had failed in his estate, and had become a journeyman; that he was disaffected to the discipline of the Church, and endeavoured to bring up the infant in his own principles, and, therefore, was unfit to

(*A*) Co. Lit. 89. b

(*i*) 2 Mod. 176.

(*k*) *Supra*, p. 28.

(*l*) *Hanbury v. Walker*, 3 Ch. Rep. 58.

Where ordered
to account
yearly.

Receiver ap-
pointed.

Executor, tes-
tamentary guar-
dian, must pay
the money into
Court after pay-
ment of debts.

have the care of her person or estate. Upon demurrer, the defendant was ordered to answer as to the account demanded, and where the infant was, and how bred; but without costs, and without prejudice to his legal interest, as to the custody of the infant, or the management of the estate. The defendant appeared by his answer to be poor, and the Court ordered him to account yearly, but saw no reason, till a default in him, to make him give security.

In the case of *Kiffen v. Kiffen* (*m*), where the child had an estate, and the father who was insolvent, and of an ill character, would take the profits, (it has been supposed, as guardian in socage), the Court appointed a receiver.

Although the statute 12 Car. 2, c. 24, expressly authorizes the testamentary guardian to take charge of the infant's property, yet he is not allowed to retain the infant's money in his hands. Thus in a modern case in Ireland (*n*), where a father had appointed the defendant J. B. testamentary guardian and executor, and disposed of his fortune, real and personal, giving the management of both, for a certain period, to the guardian and executor, for the benefit of the testator's children,—a motion was made to have the personality paid into Court, and laid out for the benefit of the children entitled to it, the debts, &c., of the testator being discharged. It was urged on behalf of the guardian and executor, that as the testator had committed the estate to his management, and as there was no imputation of insolvency or misconduct on his part, the Court ought not to take the fund out of his hands.

Lord Redesdale, C., said, that certainly the old law was as stated at the bar; but that modern decisions were different; and he made the order in this case on the general principle, without the least imputation upon the executor.

(*m*) See 1 P. W. 705, 697; 10 Vea. 55.

(*n*) *Blake v. Blake*, 2 Sch. & Lef. 26.

It has been repeatedly laid down, that where there is a guardian by the Common Law, the Court of Chancery will remove him upon any misbehaviour (o).

Guardian at Common Law removed.

If a guardian, whether by will or by the appointment of the Court, does not behave to the satisfaction of the Court, orders regulating his conduct are frequently made upon him (p); and if any such steps be taken as induce the least suspicion of the infant's being likely to suffer by the conduct of the guardians, the Court will interpose (q).

Orders made for regulation of guardians.

Interposition of Court where their conduct is suspicious.

The guardian is, generally speaking, entitled to the custody of the infant's person; but the Court will exercise its discretion for the benefit of the latter, as to delivering him up to the guardian, or permitting him to remain elsewhere, and as to the persons who are to have access to him, and the circumstances attending such access, and generally as to his education. On a question as to the person with whom the infant shall reside, the infant's inclination will have some weight (r).

Guardian entitled to custody of person.

But Court will exercise discretion.

In the case of *Foster v. Denny* (s), a man devised to his wife the custody of his son by a former marriage, an infant about seven years old. The step-mother married very meanly, and the uncle of the infant got possession of him, and sent him to a Protestant college in France. A writ of *homine replegiando* was sued out, and the uncle was ordered to send for the boy home.

Infant delivered to guardian.

A father left property to certain persons in trust for his son, and appointed them to be his guardians (t). The mother clandestinely removed the infant. Upon the petition of the guardians, Sir John Leach, V. C., ordered the infant to be delivered up to his guardians, saying, that in respect of the

(o) *Foster v. Denny*, 2 Ch. Ca. 237; *Morgan v. Dillon*, 9 Mod. 141.

(p) *Roach v. Garvan*, 1 Ves. 160.

(q) *Duke of Beaufort v. Bertie*, 1 P. W. 705; see 7 Ves. 381.

(r) Anon. 2 Ves. 374.

(s) 2 Ch. Ca. 237.

(t) *Wright v. Naylor*, 5 Mad. 77.

administration of the property of the infant, the Court had jurisdiction over his person.

Delivery delayed.

The testamentary guardian of a ward of Court (*t*) twelve years of age, and still in the hands of his mother, petitioned the Lord Chancellor, that he, as sole surviving guardian, might have the ordering, as he should think proper, of the governor and attendants of the infant, and that the person of the infant might be delivered to him. On the other side, evidence was adduced to shew that the infant was of delicate constitution, and required his mother's care. Lord Macclesfield discharged the tutor and an attendant, who were objected to by the guardian, and ordered the infant to be delivered to the guardian; but in confidence that he should be returned to his mother at night, for that as yet the Court would not make any order touching the custody of his person. Afterwards, upon the guardian's petition, stating that the mother had married her son at the age of fourteen without his consent, the person of the infant was ordered to be restored to the guardian.

Access granted to mother of illegitimate children;

In another case (*u*), a man had bequeathed considerable fortunes to his infant illegitimate daughters. The Master had, pursuant to a former order, approved of a guardian and maintenance. Their mother, who was desirous that they should be permitted to reside with her, presented a petition, objecting to the Master's report, and praying that it might be reviewed. The Lord Chancellor confirmed the appointment, but directed the Master to consider what intercourse between the infants and the mother could be reasonably provided for, in the plan of their maintenance and education under their guardian.

—to friends of the family.

In the case of *Ord v. Blackett* (*x*), the representative of

(*t*) *Eggs v. Countess of Shaftesbury*, 2 P. W. 103; Gilb. Eq. R. 268. 172, S. C. (*u*) *Courtois v. Vincent*, Jac. 172, S. C. (*x*) *Supra*, p. 110.

the deceased mother of a natural child was ordered to have free access to the child, though the latter was left under the superintendence of the father.

Where Lord Hardwicke appointed a grandmother to be guardian in preference to the father's executor, he ordered that the latter should have free access to the infants (y).

In the case of *The Earl of Ilchester*, where Lord Eldon decided, upon a contest between the mother and the uncle of the infants, that the uncle was testamentary guardian, his Lordship observed (z), "In this case I need not add, that though the effect of the appointment of a guardian is to commit the custody of the guardianship, this Court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest it is important to observe, that it can never end happily, but by implanting in the hearts of the children filial and dutiful feelings towards the parent; the best and most important duty imposed upon the guardian by the deceased parent."

Claims of mother where another is testamentary guardian.

The guardian is the proper judge as to the school or university at which his ward shall be educated; and the Court, unless some objection is shewn, will compel the obedience of the ward. For instance (a), where an infant went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, the Court sent a messenger to carry him from Oxford to Cambridge; and upon his returning to Oxford, there went another, *tam* to carry him to Cambridge, *quam* to keep him there. But if the guardians disagree as to the mode of education, the Court will exercise its own discretion on the subject, and will not consider itself bound by the wishes of the majority.

Guardian is the judge of place of education.

Obedience compelled.

If guardians disagree, Court will determine.

(y) *Hunter v. Macrae*, supra, p. 112. (a) *Trenain's case*, Strange, 168; see *Hall v. Hall*, 3 Atk. 721 (z) 7 Ves. 380.

A Presbyterian had three infant daughters (*b*), whom he brought up in his own tenets. He had three brothers, also Presbyterians. He sent his eldest daughter, at the age of sixteen, to be educated in the house of one his brothers; and he died, having devised the guardianship of the infants to his brothers and a clergyman of the Church of England. The clergyman took the two younger daughters, and placed them at a boarding school, where they were bred up in the principles of the Church; and he procured a bill to be brought against the guardians in the names of the three infants, praying that the Court would give directions for their education in those principles. The uncles brought their bill to have the daughters given to them, offering parol proof of directions of the testator that his children should be brought up as Presbyterians; but Lord Chancellor King said that parol proof should not be admitted in the case of a devise of guardianship, any more than in a devise of land: he allowed the eldest daughter to remain with her uncle, as she desired: as to the younger children, he directed an inquiry whether the school was a proper one, and refused to order them to be delivered to their uncles.

Parol evidence of wishes of deceased father as to education rejected by Lord King;

—but received by Lord Hardwicke.

Weight attached to father's wishes.

But this case having been cited on the hearing of a petition arising out of a difference of opinion between the guardians of Lord St. John (*c*), Lord Hardwicke said, that as to the particular method of education, the Court would receive parol proof of the intent of the father, receiving all sorts of evidence to govern its discretion. If the Court attaches weight to parol evidence of the father's wishes in appointing a guardian (*d*), it is natural that it should do so as to the plan of education. In the case of *Campbell v. Mackay* (*e*), Lord Chancellor Cottenham observed, that the law, which permits the father to appoint the guardians of

(*b*) *Storke v. Storke*, 3 P. W. 51. *supra*, pp. 84, 113.

(*c*) 2 Ves. 56.

(*e*) 2 M. & C. 34.

(*d*) See *Lady Teynham's case*,

his children, will pay the highest respect to the expression of his wishes as to the mode of their education. It does not appear from the report, whether the wishes of the father were expressed in his will, or collected from parol evidence.

While the penal laws against Roman Catholics were in force, it was considered to be the duty of the Court of Chancery, by analogy to the statute law, to see that all infants, over whom it had power, should be brought up in the Protestant religion (*g*). A case is reported (*h*), in which Lord Cowper ordered a Roman Catholic girl of fourteen to be sent to a Protestant school, evidently with a view to her conversion. And in another case (*i*), where all the relatives of an infant (except his father, who had become a Protestant, but had waived his parental right), were of the Popish religion, Lord Hardwicke appointed two Protestants to have the care of his person, and directed that he should continue at Harrow school, where he then was, till further order, and that no person of the Popish religion was to see him. But upon the petition of the infant's mother, it was afterwards ordered that she should be at liberty to see him at Harrow six times in every year, in the presence of his master, or of some other person to be by him appointed; and she was to give his master previous notice of her coming, and not to write any letters to her son, but such as should not be sealed, and should be sent under cover to his master.

Interference to bring up children as Protestants.

Restrictions on intercourse of Roman Catholic mother with her son.

Lord Eldon has stated (*k*), that Lord Bathurst made an order to prevent a Protestant child from being sent to a Roman Catholic school.

Interference on behalf of infant not ward of Court.

None of the reports afford any means of discovering the case which Lord Eldon alluded to. The Registrar's book,

(*g*) See *Lady Teynham's case*, supra, pp. 84, 113.

(*i*) *Blake v. Leigh*, Ambl. 306.

(*k*) Jac. 264, n.

(*h*) *Hill v. Filkin*, 2 P. W. 5.

however, contains a case which his Lordship may probably have had in view.

A guardian was appointed, on petition without suit, for the person and estate of Charles Bishop, an infant of the age of seventeen (*l*). The infant's mother, who was a Roman Catholic, agreed that he should be placed in the guardian's hands at a certain time and place; but before his arrival, she and Mr. John Ball, a reputed priest of that persuasion, conveyed away the infant and concealed him from the guardian, to whom Mr. Ball acknowledged his taking the infant away in company with his mother, but refused to tell to what place, or where the infant then was, under a pretence of ignorance, but said he believed beyond sea. The guardian made an affidavit stating these circumstances, and also stating his belief that the infant had been deposited in some Popish place in this kingdom or abroad. Upon hearing this affidavit read (*m*), (but still without any bill filed), the Lord Chancellor ordered Ball to produce and leave the infant with the guardian, or to stand committed to the Fleet.

This case presents a remarkable instance of the jealousy which the Court once entertained; as the infant to whom this extraordinary protection was extended, was not a ward of Court.

The law now
changed.

Lord Eldon has also observed, that the law is now changed as to the Court's interference against Roman Catholic guardians and parents (*n*), and that, in the time of Lord Bathurst, the Court, with reference to the distinction between Protestants and Catholics, interfered in the education of children, in many cases in which it would not interfere now (*o*).

The following modern case will shew how great a change

(*l*) *In re Bishop*, Reg. Lib./1774, (*n*) Jac. 264, n.; see *Gallini v.*
A. p. 185; see Appendix II. *Gallini*, cited 2 Sim. 37.
(*m*) *Ibid.* p. 461; see Appendix II. (*o*) 2 Russ. 22.

has taken place in the practice of the Court of Chancery with reference to this subject (*p*).

G. H. Talbot, a Roman Catholic, married a Protestant lady. They had two children, John and Augusta. By a deed of separation between the parents, it was agreed that Augusta should remain with her mother till the age of ten. The father died, having by will appointed Thomas Doyle, a Roman Catholic priest, to be guardian of his children. The infants were made wards of Court. Their mother married Mr. Berkeley, a Protestant.

Example of
modern prac-
tice.

A petition was presented on behalf of the infants, stating, amongst other things, that the guardian had removed the boy from school, and placed him under the care of his uncle, the Earl of Shrewsbury, whose presumptive heir he was, but who had been on bad terms with his father; that Lord Shrewsbury refused to allow him to visit his mother, and that she had been received very repulsively by Lord Shrewsbury's servants when she went to visit her son; that the boy, (who was in his tenth year) would, under a certain act of Parliament, eventually become absolute owner of the family estates, if he became a Protestant, and took certain oaths within six months after he reached the age of eighteen, but that he would otherwise be only tenant for life; so that it was very desirable that he should receive such an education as would enable him to choose between the Protestant and the Roman Catholic faith. The petition prayed that a scheme might be settled for the education of the infants, that Augusta might continue with her mother, and that John might have unrestrained intercourse with the latter, and might reside with her for convenient periods.

The guardian petitioned that Augusta might be delivered to him.

As to Augusta, Lord Cottenham, C., said, that the Under what cir-

(*p*) *Talbot v. Earl of Shrewsbury*, Law Journal, v. 18, p. 125.

cumstances infant having Roman Catholic testamentary guardian will be left with a Protestant mother.

mother had no right to interfere with the testamentary guardian. The Court would exercise a discretion whether an infant should be ordered to be delivered up to such guardian. The female infant was of the age of eight years and seven months, residing in her mother's house, under the care of a governess of the Roman Catholic faith, and there was strong evidence shewing her to be of delicate constitution, and requiring the care of her mother. There was also a statement of the late father's wishes that she should be left in the care of her mother till she attained the age of ten, and on that circumstance his Lordship relied as evidence, that she might safely be left with the mother till that period. He, therefore, left the female infant in the care of her mother, not superseding the guardian's right of access to see her, the guardian being subject only to the restrictions imposed by the Court. The petition of the guardian was ordered to stand over, no order being for the present made upon it. The maintenance money was ordered to be paid to Mrs. Berkeley.

As to John Talbot, the Lord Chancellor said, that it was right that he should live with Lord Shrewsbury, though it was open on his behalf to suggest any alterations as to his education. There had been no contract on the marriage as to the religion of the issue; the father had exercised the right to appoint, as testamentary guardian, a priest of the Roman Catholic faith; the Court always pays great deference to the wishes of the father distinctly expressed; and although he has no power to prescribe a particular religion to his child, yet he has indirectly the power of effecting his object by the appointment of the guardian. The interference of the Court in cases like that before it, might lead persons who dissent from the Established Church to think that the supposed pecuniary interest of a child was sufficient to remove it from the care of its testamentary guardian; zealous Catholics might leave their property to children, on

Attention paid to father's wishes.

How far father can affect religion of his child after his death.

Pecuniary inducement to abjure religion.

condition of their abjuring their faith. It was a question whether, under any circumstances, the Court would interfere with the testamentary guardian and the infant's religion as decided by the former; and even were the Court to interfere, it would be difficult to say at what period it ought to interfere. His Lordship doubted whether he should confer a pecuniary benefit on the heir by removing him from the care of Lord Shrewsbury, who had the power of granting leases for lives on the old accustomed rents before the statute by which the estates were settled. He could not see how the education of a child was to be conducted so as to enable him, at the age of eighteen years and six months, to decide the question of his religious faith for himself; for the infant must necessarily have religious instruction before that age, and it was impossible to educate him as neither Protestant nor Roman Catholic. The petition of the infants was dismissed.

Whether the Court will ever interfere with religion prescribed by testamentary guardian, *query*.

The only access to her son which the guardian would afford to Mrs. Berkeley, was at Lord Shrewsbury's house, and in the guardian's presence. Mrs. Berkeley petitioned that her son might be allowed to visit her for a month; the petition was accompanied with a medical certificate that she was in ill health, owing to her anxiety to have access to her son.

What access a mother can have to her child, where there are religious differences.

The Lord Chancellor (*r*) felt it to be necessary to look only to the interest of the infant, and to the wishes of the father, expressed in his appointment of a guardian, and he declined to make any order on the petition.

Where testamentary guardians have accepted the office, it has been laid down that they will not be discharged of the trust upon their own application, and that the Court will compel them to act. But on one occasion, Lord Hardwicke, on the petition of an infant in his eighteenth year, with the

Whether testamentary guardians will be discharged on their own application, *query*.

consent of his mother and his testamentary guardians, and of all parties concerned, and under the special circumstances of the case, ordered that the care and direction of the person and education of the infant should be committed to two near relatives until further order, and that the allowance for his maintenance and education should be paid to them (*s*). And as it can never be for the infant's benefit to continue him in the care of a negligent or reluctant guardian, it is difficult to see how the Court could avoid transferring the custody to another.

Whether testamentary guardians can be removed, *query*.

Lord Hardwicke is reported to have said that the Court sometimes, though rarely, removes a testamentary guardian (*t*); and Lord Redesdale, that where a testamentary guardian has acted, and it is sought to remove him for misconduct, a bill must be filed (*u*).

They may be superseded in their functions.

It would rather appear, however, that neither of the learned judges are to be understood as speaking of the absolute destruction of the office of guardian, but that even where an infant is taken from his testamentary guardian, the guardianship, though suspended, is yet, out of deference to the act of Parliament, not actually determined; so that there may be a possibility, however slight, of the guardian being reinstated in his functions. Lord Nottingham, in the case of *Foster v. Denny* (*x*), said that he could not remove a guardian by act of Parliament; and in a modern case (*y*), Sir John Leach, V. C., said, that the Court would not make an order to remove a testamentary guardian; but a proper case being made, he referred it to the Master to approve of a proper person to superintend the person and education of the infant, instead of the testamentary guardians, and to approve of a plan for the education of the infant; and the testamen-

(*s*) *Spencer v. Earl of Chester*. Lef. 106.
field, Amb. 148.

(*x*) *Supra*, p. 119.

(*t*) *Roach v. Garvan*, 1 Ves. 160.

(*y*) *Ingham v. Bickerdike*, 6

(*u*) *O'Keefe v. Casey*, 1 Sch. & Madd. 275.

tary guardians were restrained from interfering with the infant's person or estates.

In a case before Lord Thurlow (z), a testamentary guardian having been declared a bankrupt, it was referred to the Master to approve of a proper person to have the care of the person of the infant.

Superseded on bankruptcy.

The testamentary guardian will not be removed, because he has a pecuniary interest in the death of the infant. A man devised his real estate (a) to his three daughters and their heirs; and afterwards by a codicil, he devised it over to his wife, in case his three children should die without issue of their bodies, and made her their guardian. She married again within six months after his death. The Lord Chancellor of Ireland decreed that the children should be removed from the mother their guardian, and he appointed another guardian of their persons, with liberty for the mother to visit them at any time; but he made no order as to the guardianship of the lands, as there was another bill depending as to that point (b). But this decree was reversed in the House of Lords, and the mother confirmed in the guardianship: for it was held that the Court had no power to control the will, except upon proof of misbehaviour in the guardian.

Not removed on account of pecuniary interest in death of infant;

nor for anything except misbehaviour.

The Court has always shewn great reluctance to permit its wards to be carried out of the jurisdiction. In a case in the last century (c), female infants who had arrived at years of discretion, having relatives and property at Dantzic, were

Practice as to allowing infants to go out of the jurisdiction.

(z) *Smith v. Bate*, Dick. 631.

(a) *Morgan v. Dillon*, 9 Mod. 135; *Dillon v. Lady Mount Cashell*, S. C. 4 Bro. P. C. 306; see *Corbet v. Tottenham*, 1 Ba. & B. 59.

(b) It seems to have been not unusual in Ireland to commit the guardianship of the person and the

guardianship of the estate to different individuals, and that, even where a receiver was appointed. See *Dawson v. Massey*, 1 Ba. & B. 219; *Cary v. Cary*, 2 Scho. & L. 173.

(c) *Jeffrys v. Vantensworthworth*, Barn. 141.

allowed to go to that city, on their guardian's recognizance that they should return within a certain period, and should not marry without leave of the Court.

In the case of *Mountstuart v. Mountstuart*, in 1801 (c), Lord Eldon appears to have said that the Court never makes an order for taking the infant out of the jurisdiction; and in *De Manneville v. De Manneville* (d), his lordship restrained a father, himself an alien, from removing his child to a foreign country.

What restrictions are imposed.

In a later case (e), the father had been appointed to a situation abroad in the King's service; he had in vain made overtures of reconciliation to his wife, who lived separate from him, and the Lord Chancellor ultimately ordered, with reluctance, that the father should be at liberty to take the infants abroad with him, undertaking to bring them, or such of them as should be living, back with him; and he was half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the infants, actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided.

Protection of children whose father is abroad.

Lord Eldon said on another occasion (g), that, notwithstanding the acknowledged legal right of a parent to the custody of his children, the Court, if he were abroad, and their property were put under its care, would not suffer him to interfere with respect to the infants, because it could not make him responsible for his conduct towards them.

More recently, where a father had removed his son to America, and, after behaving very dishonestly, refused to send him back, Sir John Leach, M. R., refused to allow maintenance; but Lord Chancellor Brougham allowed it,

(c) 6 Ves. 363.

265, n.; see Set. Dec. 233.

(d) 10 Ves. 52.

(g) *Wellesley v. Duke of Beaufort*.

(e) *Jackson v. Hankey*, Jac. fort, 2 Russ. 18.

looking solely to the benefit of the infant; and he followed the case in *Jacob*, requiring certificates and vouchers to be laid before the Court every year (*k*).

In a late case (*i*), an infant, a native of Ireland, was allowed to go to the University of Dublin, in order that he might be near his father who was in very bad health. It was ordered that his guardians in England should enter into a recognisance to bring him back when required, that the maintenance money should be paid to them, and that the fact of his continuing at the university should be from time to time verified by affidavit.

On one occasion (*k*), Lord Cottenham, C., allowed a ward of Court, of the age of eighteen, to go abroad to visit his father; the gentleman by whom he was to be accompanied giving security that he should be brought home within three weeks.

On this subject, Lord Cottenham has observed (*l*), that circumstances may arise, under which it would be inexpedient to adhere to the general rule against permitting an infant ward of the Court to be taken out of the jurisdiction; because the health, and possibly the life of the ward may depend upon his removal to another climate; that exceptions are sometimes made to the rule; but that his Lordship has had reason to lament that it has not been more strictly adhered to. His Lordship further declared his conviction, independently of the established rule of the Court, and the principle upon which it proceeds, that scarcely anything can be more injurious to the future prospects of English children, and particularly of English boys, than a permanent residence abroad. Without the proper opportunities of attending the religious service of the Church to which they belong, sepa-

Principles on which the Court will act.

(*k*) *Stephens v. James*, 1 M. & K. 627. (*l*) *Campbell v. Mackay*, 2 M. & C. 31.

(*i*) *Lethem v. Hall*, 7 Sim. 141. (*m*) *Wellesley's case*, 2 R. & My.

(*k*) *Biggs v. Terry*, 1 M. & C. 675. 639; see p. 148, *infra*.

rated from their natural connexions, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should afterwards occupy in their native land.

Undertaking to
bring ward
back.

Strictly speaking, the person taking the ward out of the jurisdiction, ought to sign an undertaking in the registrar's book to bring him back within the time prescribed by the Court (*l*); but this rule is occasionally relaxed in practice, and the undertaking of counsel is sometimes considered sufficient.

Eloignement of
ward a criminal
contempt.

To carry off a ward of the Court from the custody of those with whom the ward has been residing by authority of the Court, is a criminal contempt, and a person who does so will not be protected from attachment by privilege of Parliament.

Certain infant wards of the Court were residing with their aunts, and the Court made an order, restraining the father and all other persons from removing them from the custody of their aunts without the permission of the Court, and until further order. The care of the children, with full discretion as to the disposal of them, was committed to two persons as guardians; they sanctioned the continuance of one of the children with the aunts; one of the guardians died, and the guardianship was thereby determined, but the child continued with the aunts, and the original order was still in force. The father, who was a member of the House of Commons, clandestinely removed the child, concealed her residence from the Court, and avowed that he had ordered her to be taken out of the realm, and that he would never bring her again within the jurisdiction of the Court. It was con-

(*l*) *Talbot v. Earl of Shrewsbury*, Law Journal, v. 18, p. 125.

sidered that the aunts had possession of the child under the authority of the Court, and the father was committed.

In the case of Bishop, Lord Bathurst seems to have been disposed to exercise this jurisdiction in behalf of an infant for whom a guardian had been appointed by the Court without suit (*m*).

By a late statute (*n*), the Court of Chancery has been entrusted with certain powers over infants convicted of felony. It is provided by

Custody of infant felons.

Sect. 1, "That in every case in which any person being under the age of twenty-one years shall hereafter be convicted of felony, it shall be lawful for Her Majesty's High Court of Chancery, upon the application of any person or persons who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such Court shall find that the same will be for the benefit of such infant; due regard being had to the age of the infant, and to the circumstances, habits, and character of the parents, testamentary or natural guardian, of such infant, to assign the care and custody of such infant during his or her minority or any part thereof, to such person or persons, upon such terms and conditions, and subject to such regulations respecting the maintenance, education, and care of such infant, as the said Court of Chancery shall think proper to prescribe and direct; and upon any order for that purpose being made, and so long as the same shall remain in force, the same shall be binding and obligatory upon the father, and upon every testamentary or natural guardian of such infant, and no person or persons shall be entitled to use or exercise any power or control over such infant which may be inconsistent with such order of the said Court of Chancery:

Court of Chancery empowered to assign the care of infant convicted of felony to any person other than the testamentary or natural guardian.

Provided always, that the said Court may at any time rescind such assignment, or from time to time, rescind, alter,

Court may rescind or alter such assignment;

(*m*) *Supra*, p. 124.

(*n*) 3 & 4 Vict. c. 90.

or vary any such terms or conditions, or such regulations as to the said Court may seem fit; and provided also, that the said High Court of Chancery shall and may award such costs as to it may seem fit, against any such person or persons who shall make such application as aforesaid, if such application shall not appear to the said Court well founded; and such costs shall be payable to any parent or other natural or testamentary guardian of any such child who shall oppose such application."

and award costs in certain cases.

Infant not to be sent beyond the seas, &c.

Sect. 2 enacts "That in every case it shall be a part of the terms and conditions upon which such care and custody shall be assigned, that the infant shall not, during the period of such care and custody, be sent beyond the seas, or out of the jurisdiction of the said Court of Chancery."

No fee to be taken by officer of Court.

Sect. 3 enacts "That no fee, reward, emolument, or gratuity whatsoever, shall be demanded, taken, or received by any officer or minister of the said Court of Chancery for any matter or thing done in the said Court in pursuance of this act; and that upon the making or opposing any such application, it shall be lawful for any judge of the said Court to assign counsel learned in the law, and to appoint a clerk or practitioner of the said Court to advise and carry on or to oppose such application, who are hereby required to do their duties therein without fee or reward."

Counsel may be assigned.

This act not to interfere with execution of the sentence.

Sect. 4 enacts "That nothing in this act contained shall affect, or in any manner interfere with, the execution of the sentence which may have been passed upon his or her conviction."

The Court has also received certain additional powers by the Act for the Custody of Infants, mentioned below.

CHAPTER XIII.

JURISDICTION OF COURTS, WHERE GUARDIAN IS APPOINTED BY A STRANGER IN THE FATHER'S LIFETIME.

A DEVISE, by a stranger, of the guardianship of an infant is absolutely void in itself, even though it be attended with a gift of property; but any one can give his estate on what conditions he pleases, and if such a devise be made in the father's lifetime, it may derive validity from his acquiescence.

Devise of guardianship by stranger, void.

Father's acquiescence may give validity.

Where a benefit is given to the father on condition of his resigning the management of his children, he will not be permitted to receive the gift without complying with the terms of it; and on his submission, a person will be appointed to act as guardian: although the mere acceptance of the gift by the father will not be considered as an election to abide by the will, and to waive his parental right, unless he knows that he is making the election. But the Courts will reserve power over him, if he knowingly accepts a bounty given to himself by the will; or if he avails himself of a bounty given for the maintenance of his children, which he must otherwise have provided at his own expense. If a testator provides a fund for the maintenance and education of children during their minority, and at the end of that period, makes a further provision for them, and the father permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded

He must not receive gift without complying.

What amounts to election.

Father must not interrupt education sanctioned by him.

upon a particular species of maintenance and education, which he himself cannot afford to give them, he is not at liberty to take them from the course of education which they have hitherto pursued, and in consequence of which, their views in life are different from what they would have been without it.

If a father has permitted his children to be brought up by other persons of a religious persuasion different from his own, he will not be allowed to interfere; for their happiness must be affected, if they are interrupted in their course of education in the principles of that persuasion.

Where legacy conditional, father must undertake not to interfere.

In a case (a) before Sir John Leach, V. C., a sum of money being left to an infant, with a direction that her education should be committed to certain trustees, and a legacy to the father, on condition of his not interfering in it; it was declared by the decree, that he was not entitled to the benefits given him by the will, unless he should give an undertaking not to interfere; and that, in the event of his giving such undertaking, the trustees were entitled to the guardianship. The Court afterwards ordered the costs of so much of the suit as related to his recognisance to be paid out of his legacy.

Having consented, he cannot take back the children;

A man left considerable legacies (b) to the infant children of his brother, and an annuity to the brother, requesting the latter to commit the education of the children to the executors, and revoking the gift of the annuity in case of noncompliance. Several of the children were taken from the brother by the executors without any objection being made, and were placed at different schools, and the brother received his annuity. Upon an application to the Court for maintenance, it was ordered, that the Master should inquire whether the brother was willing to commit the education of the children

(a) *Colston v. Morris*, Jac. 257, (b) *Potts v. Norton*, 2 P. W. n.; 6 Mad. 89, S. C.; Beames on 110, note. Costa, p. 390.

to the executors; and, in that case, the Master was to inquire what was proper to be allowed for their maintenance. The Master reported that the brother had appeared before him, and had consented thereto; and this report was confirmed, and certain sums allowed for maintenance. The brother, having afterwards taken away two of the children from the schools where they had been placed, was ordered, upon the petition of the executors, to replace the children. He asserted that he had never given his consent, but the Master of the Rolls declined to go into this question while the report of his consent remained in force; leaving it open for him to apply, if he chose, to take off the effect of that proceeding.

nor dispute report of consent.

A man had given benefits by will to his son, and also to his grandson, and had appointed guardians to the latter (c). The father brought a bill in the name of the infant as his *prochein amy*, and also in his own name, to establish the will, and to have the trusts performed: and the guardians named in the will having refused to act, a guardian was appointed by the Court. Afterwards, under altered circumstances, the father petitioned for the guardianship. Lord Hardwicke considered that the Court had interposed after the father had submitted to the will and waived his parental right; and he saw no ground to alter what had been done with the consent of all parties. The custody was committed to two persons who were proposed by the father, and not objected to by any of the other parties.

Consent cannot be revoked.

A man made his will (d), containing gifts to his sister's husband, and also to her sons, upon the express condition that his executors should have the guardianship of the infants during their minority. The father of the infants had allowed them to live with the testator, and to be educated

(c) *Blake v. Leigh*, Ambl. 306.

(d) *Powell v. Cleaver*, 2 Bro. C. C. 500.

The Court will take care that children are properly educated.

at his expense; he received the benefit intended for him by the will, and for some time made no objection to the guardianship resting with the executors; but he afterwards withdrew the eldest son from the care of the person with whom they had placed him. Lord Thurlow declared, that the Court would take care that the infant was properly educated according to his expectations, and he ordered that the Court should be informed how the infant was then disposed of.

Lord Eldon has observed of this case (*e*), that the receipt, by the father, of the bounty given to him, could not sustain the jurisdiction of the Court; since the father, not knowing that he was making the election, was at liberty to pay back the money.

A grandmother (*g*) provided for her grand-daughters by the devise of lands and by pecuniary legacies, and intrusted to her daughter, the aunt of the infants, the management of their property, and the discretion of providing for their maintenance and education out of it, and also appointed her their guardian.

The father of the infants had committed them to the care of the testatrix, and she had defrayed the expenses of their education. After her death, they continued to reside in the same manner under the care of their aunt, by whom they were educated in the Baptist persuasion. Three years later, when they were of the ages of nineteen, fourteen, and twelve, respectively, the aunt married, and the father filed a bill in the name of the infants, as their next friend, against the aunt and her husband, for accounts of his daughter's fortunes, and insisting that they ought to be placed under his care, and that, not being of ability to maintain them, a proper sum should be allowed to him for that purpose. He

(*e*) 10 Ves. 63.

(*g*) *Lyons v. Blenkin*, Jac. 245.

was a dissenting minister of slender means, formerly a Baptist; but for some years past a Unitarian.

Lord Eldon not having chosen to decide the question upon *habeas corpus*, the father presented a petition for the restoration of the infants to him; but his Lordship considered that the father, by his consent, had enabled the guardian to act, and he refused to withdraw the children from the custody of their aunt.

Even where no condition was annexed to the bequest, the Court has proceeded very cautiously where there was something like waiver of the paternal right. An uncle took his three infant nieces into his house (*h*), and maintained them. He left them, by his will, considerable legacies, which were to go over on marriage under twenty-one, without the consent of his executors. One of the executors, a cousin of the testator, inhabited the testator's house, and the nieces continued there. The father of the children petitioned that they might be delivered to him; the eldest of the infants, who was of the age of thirteen, appeared in Court, and denied that she was under any force. It appeared to have been the wish of the testator that the infants should remain. Lord King said, that the father was entitled to the custody of his own children during infancy, not only by nurture, but by nature; but he thought that he could not, in so summary a way as on a petition, and without a bill, deliver over the bodies of the infants to their father: the latter, he said, might take them, if he could, but not by force; and the executor who had them in his custody, was directed to allow the parents free access to them at all seasonable times.

Where father seems to have waived his right, the Court will not order the children to be restored without suit.

In a case which was heard in private, where a man and his wife were living apart (*i*), and the income of the former

Doctrine stated by Lord Eldon.

(*h*) *Ex parte Hopkins*, 3 P. W. 152.

(*i*) *Jackson v. Hankey*, Jac. 254, n.; *Ibid.* 264, n., S. C.

was small; the latter having considerable separate property, petitioned that her infant children might be placed with her, or that the Master might approve of a plan for their education, and appoint a proper person to have the care of them; and she offered to maintain them herself; and it was urged that the father's income did not enable him to give them an education suitable to their expectations. Lord Eldon is reported to have said, that where there was a cause in Court, he might attach some weight to the consideration, that a person had made an appointment in favour of the infant, and would not continue it if the infant resided with his father; and that wherever the Court had interfered against the father upon pecuniary considerations, there had been some immediate irrevocable provision by which the child could be suitably brought up: the Court would not permit the father capriciously to deprive the child of that benefit. As in *Powell v. Cleaver*, where benefits were given to a child, on condition that he should be educated in a particular manner, the father was not allowed to defeat the gift. So, in the case of *Fagnani v. Selwyn* (k). But the Court would not interfere on a mere offer.

Children cannot be taken from father merely by gift.

It is not to be inferred from these expressions, that any one may separate a father from his child merely by giving a pecuniary benefit to the latter; for such an interpretation would be at variance with the declarations of Lords Hardwicke, Northington, and Thurlow, and of Lord Eldon himself, who have rested the jurisdiction of the Court solely on the necessity of protecting those interests which the father's consent has enabled the child to acquire; but only that, when a father has permitted his child to accept a conditional gift, the latter will be educated suitably to the prospects which have been thus opened to him, and the father will not be suffered capriciously to interfere with them, especially

(k) Jac. 268.

where he has not the means of educating the child well himself.

It has been seen that, in *Powell v. Cleaver*, the father had actually allowed his son to be educated in the manner prescribed by the will, so that an interruption of that course of education could not but prove injurious to him.

There must be consent;

and education commenced.

In the case of *Fagnani v. Selwyn*, the infant's father was dead, and her mother lived abroad; and a settlement having been made on her, on condition of her being under the care of the settlor, it was referred to the Master to consider whether he should be appointed guardian, taking the settlement into consideration.

Guardianship of orphan granted to person making settlement.

But if the removal of infants from their father's custody be made the condition of a bequest, and he consistently refuses to part with his children, it does not appear that there are any means of compelling him to do so. Lord Hardwicke observed, in the case of *Blake v. Leigh (1)*, that there are instances where grandfather has given his estate to grandchild and appointed guardians of his estate and person; and if the father did not submit to the will, the Court has made the father's opposition a forfeiture of his son's estate.

Father may refuse to part with his child;

though child thereby loses benefit.

Whatever may be the hardship of such a forfeiture, infinitely greater evils might arise from postponing the claims of nature to mere pecuniary advantages, and referring it to the discretion of the Courts to regulate the interference of strangers with families, and to say how much money can counterbalance the interruption of domestic ties, and the loss of a father's protection.

Where, indeed, property is simply left to a child whose father is alive, and the child is made a ward of Court, it is the practice of the Court if maintenance is given out of the child's property, to see that it is suitably educated; but this protection does not interfere with the guardianship of the father.

But Court sees its wards properly educated.

(1) Ambl. 306.

CHAPTER XIV.

INTERFERENCE BETWEEN FATHER AND CHILD ON THE
GROUND OF THE FATHER'S CHARACTER.

Principle of
the jurisdiction.

THE general principles upon which Courts of Equity interfere between father and child, were discussed in the case of *Giffard v. Giffard* (a), in which it appears to have been held that the paternal authority, as to its civil course, was founded in nature, and the care which it was presumed the father would take for the education of the child; but if he would not provide for its support, he abandoned his right to the custody of the child's person; or if he would educate it in a manner forbidden by the laws of this state, the public right of the community to superintend the education of its members, and to disallow what, for its own security and welfare, it should see good to disallow, went beyond the right and authority of the father.

Where maintenance directed,
Court controls expenditure.

When the Court gives directions for the maintenance of an infant, it controls the expenditure of the money which has been allowed, and it requires to be informed of the course of education which is adopted.

I. Father insolvent.

Where a father is unable to support his children properly, the Court will order them to be maintained out of any fund which may be available for that purpose. The poverty or insolvency of a father whose character is good, can afford no

(a) See Mr. Lofft's note to *Bliss v. Bliss*, 1775, fo. 445. between a Roman Catholic father and a Protestant mother. Reg. *Giffard* arose out of a dispute be-

ground for removing the infant from his custody, and he is generally intrusted with the expenditure of the money allowed for maintenance (b). But where it has been made to appear to the Court that the father has deserted his children, or that his character is such that they will be in danger of personal ill treatment or of moral contamination if they reside with him, the Court has not hesitated to take the children from him, and to place them in safe custody, to see that the money allowed for their maintenance shall procure them a suitable education; and where there was no opposition, this has been done upon petition without suit.

Maintenance paid to him. But if his conduct is bad,

children taken from him.

In the following cases, the father was insolvent.

A young girl had a great estate, and the father, who was insolvent and of bad character, insisted on taking the profits. Lord Macclesfield appointed a receiver of the estate, and committed the infant to the care of a third person (c).

Receiver and guardian appointed.

An infant who was about nineteen years of age was entitled to a legacy of £5000 (d); his father was in a low situation of life, and in insolvent circumstances. The petition presented by the infant represented that his father was indebted to him in a sum which he was unable to pay, and an order was made by consent for the father to authorize another person to receive the dividends of the infant's fortune, and also by consent for the Master to approve of a proper person to have the care of him, and to inquire whether he had contracted any debts for necessities.

The same by consent.

An infant of the age of eighteen presented a petition (e), no bill being filed. The petition supported by affidavits stated, that the infant was entitled to an estate, which was in danger of being wasted and entirely lost to him by the father who was in insolvent circumstances; and it prayed

Receiver and guardian appointed; the former on petition without suit.

(b) *Kilpatrick v. Kirkpatrick*, Reg. Lib. 1828, A. fo. 2106. (d) *Wilcox v. Darker*, Jac. 250, n. (c); 2 Dick. 631, S. C.

(c) *Kiffin v. Kiffin*, cited 1 P. W. 705, 697. (e) *Ex parte Mountfort*, 15 Ves. 445.

- Nature of the guardianship. that a certain person might be appointed guardian, that a receiver might be appointed, and that a reference might be directed for maintenance. The Lord Chancellor made the order for the person named to be appointed, not guardian, which, his Lordship said, could not be during the father's life (*d*), but *to act* as guardian of the estate and person of the infant, referring it to the Master to consider of a proper allowance for maintenance, and refusing the application as to a receiver. No opposition seems to have been offered to this application. A bill was afterwards filed and a receiver appointed.
- Desertion by father. A father, having three children (*e*), had separated from their mother, and was not of ability to maintain them. The children had been left with their mother under circumstances amounting to a desertion of them by the father. The Court, on the petition of the infants, made an order referring it to the Master to appoint a proper person to act in the nature of a guardian to them, and to inquire whether it would be for their benefit that a certain sum should be raised and paid to the guardian. It is not stated that the application was opposed.
- Guardian on petition without suit. A petition was presented (*g*) by the mother of an infant stating that the father was in embarrassed circumstances, and under outlawry, and had, until lately, resided abroad; that he had left the petitioner and the infant without any provision, and that they were supported by some property left to her separate use; that he had lately returned, and threatened to remove the infant from school and carry him abroad, and that he had no income to enable him to support the infant. Upon certain friends undertaking the care and superintendence of the infant's education, it was ordered that he should be placed under their care, and that the father should be restrained from removing him from the
- Desertion; threat to convey abroad. Guardian. Injunction to restrain father from interfering.
- (*d*) See p. 149, *infra*. (*g*) *Creuse v. Hunter*, 2 Cox, 242; 2 Bro. C. C. 500, n. ed. Belt. 499. (*e*) *Re England*, 1 R. & My. Jac. 250, note (*a*).

school and situation in which he was then placed, and from carrying and taking him abroad, out of the jurisdiction of the Court, and from using or employing any means for that purpose.

A bankrupt (*h*), who had no settled place of abode, had been confined in Newgate for want of bail, upon articles of the peace exhibited against him by his wife for his cruel behaviour to her. His infant children were interested in certain property, and they were living under the care of the mother and her friends, by whom they were maintained. The father, who was wholly unable to provide for them, threatened to remove them from the schools at which they had been placed. Upon a petition stating these facts, and supported by affidavits, the Lords Commissioners, after hearing counsel, referred it to the Master to approve of a proper person to have the care of their persons and superintendence of their education during their minorities, and granted an injunction, (as in the case of *Creuze v. Hunter*), against their father. It does not appear that he opposed the petition.

Guardian and
injunction
against father.

Where both parents had misconducted themselves, and were poor and unable to maintain the infants, the infants have been taken from both and committed to the care of other persons (*i*).

Children taken
from both pa-
rents.

Where the father is able to maintain his children, it is not the practice to make any order for their being maintained out of their own property, however extensive: and, consequently, the Court does not in general assume the superintendence of the infant's education, for it will not take upon itself to control the expenditure of the father's money, which is not subject to its jurisdiction, and it does not think proper to resort to the infant's money, but rather to accu-

II. Father not
insolvent.

Maintenance
not ordered out
of infant's pro-
perty.

(*h*) *Ex parte Warner*, 4 Bro. C. 2 Dick. 779.
C. 101; *Skinner v. Warner*, S. C., (*i*) *Allen v. Coster*, 1 Beav. 202.

mutate it while maintenance can be supplied from any other source.

But if infant is
in danger from
father,

maintenance
and education
is provided,

and child re-
moved from
father.

Father restrain-
ed from taking
child abroad.

But if it appears to the Court that the infant is in danger from the father's character, the Court will interfere to restrain him from doing any particular act from which injury is apprehended, such as removing the infant out of the jurisdiction; the pecuniary consideration, the desire to increase the infant's fortune, gives way to the moral consideration of the necessity of seeing that he is safely and virtuously brought up; and the Court, where the child's education is neglected, will direct part of his income to be applied for that purpose, under the general reservation of further directions and, if a very strong case is made out, will order maintenance for the infants out of their own property, relieving the unworthy father from this burthen, and will remove them from his custody and appoint other persons to have the care of them.

In the case of *De Manneville v. De Manneville* (i), a wife living apart from her husband, (who was a French emigrant, and at that time [1804] in the situation of an alien friend), and possessing considerable separate property, petitioned that her child, an infant aged eleven months, whom the husband had forcibly carried away, might be delivered to her; or at all events that the husband might be restrained from taking it out of the jurisdiction. The petition was supported by affidavits charging him with irreligious and jacobinical sentiments, and with ill-usage of his wife. Lord Eldon observed that the Court of Chancery had interfered to prevent parents from preaching irreligious doctrines in the presence of their families; and that in a case where the father was in constant habits of drunkenness and blasphemy, poisoning the mind of the infant, he had himself called in the authority of the King, as *Parens Patriæ*, and had removed the

(i) 10 Ves. 52. *Infra*, p. 159.

child from its father. In the case before him, Lord Eldon ordered that the father and all other persons should be restrained from taking the child out of the kingdom, and that he should give security not to remove the child, nor do any act towards or for the purpose of removing it out of the jurisdiction.

In the case of *Whitfield v. Hales* (k), the Court ordered a reference for a guardian and maintenance for infants, upon a petition supported by affidavits of gross ill-treatment and cruelty towards the infants by their father, who did not oppose the application. The report does not mention the pecuniary circumstances of the father.

Cruelty.
Guardian and
maintenance
ordered.

In the case of *Shelley v. Westbrook* (l), the petition of the infant plaintiffs stated that their father had deserted their mother, and had since unlawfully cohabited with another woman; that they and their mother, who was lately dead, had been maintained by the mother's father; that their own father had written a blasphemous and atheistical work, and intended to get possession of them, and educate them as he thought proper. Their maternal grandfather had lately settled a sum of money upon trust for them. This representation was supported by affidavit, and was not affected by the father's answer. Lord Eldon considering it to be established that the father not only had acted most immorally, but deemed it his duty to recommend to those whose opinions and habits he might take upon himself to form, *that* conduct in some of the most important relations of life, as moral and virtuous, which the law considers immoral and vicious, ordered the father and his agents to be restrained from taking possession of the persons of the infants, or intermeddling with them, till further order; and referred it to the Master to inquire what would be a proper plan for the

Irreligion and
immorality.

Injunction
against father.

Scheme for
maintenance
and custody.

(k) 12 Ves. 492.

(l) Jac. 266.

Pecuniary considerations disregarded.

maintenance and education of the infants; and also to inquire with whom and under whose care the infants should remain during their minority, or until further order (*m*). This order was made, notwithstanding a suggestion that the pecuniary interests of the children might be unfavorably affected by it, the Court considering that interests of higher importance were involved.

Residence abroad is a reason for refusing infants to father.

In a late case (*n*), the infants were interested in certain property, and were living with their mother in England; their father was residing abroad, in criminal intercourse with another man's wife. The father returned to England in company with the woman alluded to; and his wife, apprehending an attempt on his part to carry the infants abroad, filed a bill, with a view to obtain for them the protection of the Court of Chancery. The father went abroad again in the same company as before. The mother died, and the children remained under the care of her sisters. The father attempted to obtain possession of the infants by *habeas corpus*, but the Lord Chancellor (Eldon) intimated his opinion, that the circumstance of the father being then resident abroad, was alone sufficient to justify the Court in refusing to him the actual custody of the infants (*o*); and after various proceedings the father returned to England, purchased a suitable mansion, and claimed by petition the custody and management of his children. Affidavits were filed in support of and in opposition to the petition, and the Lord Chancellor considered them to have established that the father was able to maintain the children, but that his adulterous intercourse still continued, and that there had been most grossly improper conduct on his part towards the children, when formerly under his care. It also appeared

(*m*) See p. 128, *supra*. The decision of Lord Eldon seems to be in strict analogy to stat. 9 & 10 W. 3, c. 32; *supra*, p. 115. (*n*) *Wellesley v. Duke of Beaufort*, 2 Russ. 1. (*o*) *Supra*, p. 129.

that none of the relatives of the children thought that they ought to be placed under the care of their father.

His Lordship refused to restore the infants to their father, and referred it to the Master to consider under whose care and custody (exclusive of the father) they should be placed; and he restrained the father and all other persons from removing them from the care of their aunts, until further order.

In this case, notwithstanding Lord Eldon's statement in *ex parte Mountfort* (p), that a guardian could not be appointed during the father's life, an order was made, after his Lordship had resigned the Great Seal, for the appointment of guardians (q); and, on the death of one of the guardians, a new reference for guardians was granted (r).

A man having treated his wife with cruelty (s), and his children (four in number, and all under nine years of age) with harshness, and having introduced women of profligate character into his house, and taught the children to repeat and write irreligious and blasphemous language, the wife left his house, and took the children with her. A bill was filed, stating that £1000 had been settled upon the children by their maternal grandfather, and that he was willing to contribute further to their maintenance if they were withdrawn from the father; that the marriage settlement of the parents secured a separate income to the mother, and, eventually, portions to the infants. The father's pecuniary affairs were greatly embarrassed, but it was not stated that he was insolvent.

It was ordered, that the father should be restrained from suing out any writ of *habeas corpus*, and from prosecuting any such writ already sued out, for the purpose of obtaining

(p) *Supra*, p. 143.

(s) *Mytton v. Holyoake*, Reg. Lib.

(q) See 2 R. & My. 640. *Supra*, 1830, B., fo. 482. See *Mytton v. Mytton*, 3 Hag. 657.

p. 131.

(r) Reg. Lib. 1830; B., fo. 1611.

possession of the infants, and also from taking possession of them, or attempting to do so, till further order. It was also ordered, by consent of the father by his counsel, that the mother and certain other persons should be appointed to have the care of the infants; and that the interest of the settled sum of £1000 should be paid to the persons so appointed.

How far the father's adultery is ground of interference;

On the petition of a mother and her daughter, a child about fourteen years of age (*t*), praying that the daughter might be placed under the mother's care, she offering to maintain her at her own expense, or that the mother might be permitted to have access to her daughter at all convenient times; it being stated at the bar, that the father was living in habitual adultery, on account of which the mother had obtained a divorce in the Ecclesiastical Courts,—Sir Anthony Hart, V. C., said, that the Court had nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman that some conduct, on the part of the father, with reference to the management and education of the child, must be shewn, to warrant an interference with his legal right to the care and custody of his child. He did not know of any case similar to that before him, which would authorize his making the order sought, in either alternative. If any could be found, he would most gladly adopt it; for, in a moral point of view, he knew of no act more harsh or cruel, than depriving the mother of proper intercourse with her child. His Honor observed, "that he had himself been counsel in two cases in which Lord Eldon refused petitions precisely similar. *Smith v. Smith*, one of them, was precisely similar, in its facts, to *Ball v. Ball*, except that the father's object there was to compel the mother, by such means as those now complained of, to give up to him some property which was settled to her separate use. His Honor's argument in that case had been,

—what access the mother will be allowed in such a case.

(*t*) *Ball v. Ball*, 2 Sim. 85.

that, as the law allowed the mothers of bastards to retain possession of their children till the age of seven (u), *à fortiori*, must the law allow the care of legitimate children to be vested in the mother. The child in that case was under seven: the Lord Chancellor, however, refused the order; and, before any further proceedings were had, either the mother's or the child's death determined the question. That was a very strong case; yet the Lord Chancellor held that the Court had not jurisdiction. The other case was *Gallini v. Gallini* (x). There the petition was on the ground of the father's religious principles: he was a Catholic; but the Lord Chancellor refused, for such a reason, to take the children away from the father. Counsel had then pressed that access might be allowed to the mother; but the Chancellor refused the order."

This decision of Sir A. Hart seems to be directly contrary to the declaration of Lord Eldon, in the case of *Jackson v. Hankey* (y), that as the children were wards of the Court, and therefore under its protection, and recollecting that children ought to be brought up in dutiful obedience and warm affection towards both parents, he could not allow the father to take them so out of access as not to have opportunities of nourishing those feelings. If any complaint was made of want of access, that might be remedied.

The law as to taking wards of Court out of the jurisdiction, has been stated above (z).

(u) But see *supra*, p. 67. 130.

(x) See p. 124, *supra*.

(x) *Supra*, p. 129.

(y) 2 Jac. 264, *supra*, pp. 130,

CHAPTER XV.

HABEAS CORPUS.

THE jurisdiction of the Lord Chancellor upon *habeas corpus* is part of the common law jurisdiction of the Great Seal, and is exactly the same with that of the judges of the common law courts.

Principle to deliver from restraint.

Habeas corpus proceeds on the fact of an illegal restraint, and the person entitled to the legal custody of an infant, of whatever age, may obtain the writ, in the first instance, to bring him before the Court.

An infant (*a*) eloped from her father, and was detained from him by force, with a view to her marriage. The Court of King's Bench granted a *habeas corpus* directed to the person detaining her, and a rule for an information *nisi*.

An infant of thirteen (*b*) absconded from his father, and was detained by a third person, under pretence of being his apprentice. Upon an affidavit stating these facts, the Court of King's Bench granted the father a *habeas corpus* in the first instance to bring up the infant.

I. Infant of years of discretion set free.

When the writ is obeyed, and the party brought up is capable of using a discretion, the individual who has been under restraint is declared at liberty; and the Court will even direct, if necessary, that he shall be attended home by an officer, to make the order effectual (*c*).

(*a*) *Rex v. Ward*, 1 W. Bl. 386.

(*c*) See Jac. 254, n.; 4 Adol. &

(*b*) *Re Pearson*, 4 Moore, 366.

Ell. 624; 2 Swanst. 538.

A boy (*d*) nearly fourteen years old was brought up by *habeas corpus*, sued out by his father, in order to have him delivered over by an aunt, who kept him. The boy expressed great unwillingness to go to his father; and the Court had a very bad opinion of the father's design, in applying for the custody. They declared that upon this writ they could only deliver the boy out of the custody of the aunt, and inform him that he was at liberty to go where he pleased. He chose to continue with his aunt. The Court said the father might have other remedies, in which the right of guardianship might properly come into question. They seemed to consider that they could only free a person from actual restraint, and not hand over the custody to the person entitled. *Rex v. Johnson* (in which the custody had been changed) (*e*) was said to be wrong, and it was stated that Lord Raymond at last thought so himself. Lord Mansfield, however, in a subsequent case (*g*), thought that both decisions were right; though he dissented from the dicta in *Rex v. Smith*, (i. e. from the notion that the Court could not deliver the custody to another, as well as deliver the party from actual restraint).

Against demand of father.

The father of a girl about fifteen years old (*h*) bound her apprentice to a music master. During her apprenticeship she was debauched by a third person; by collusion with

(*d*) *Rex v. Smith*, Stra. 982; *custodia*." See *ex parte Hopkins*, and see the same case reported in 3 P. W. 152. *Lady Henrietta Berkeley's case*, A. D. 1682. 3 Harg. St. Tr. 544; *Lady Catherine Annesley's case*, cited Ridg. 149; 8 Mod. 214; Gilbert, Eq. R. 173; 2 P. W. 112. (*e*) 8 Mod. 214; Lord Raym. 1334, S. C.; Stra. 579, S. C.; see *infra*, p. 186. (*g*) *Reg v. Delaval*, Burr. 1434, S. C.; 1 W. Bl. 410. (*h*) *Rex v. Delaval*.
 ing, "I do not know but that the father may take the child wherever he finds him. However, he has his remedy against any person who detains him illegally; he may bring his writ of ravishment of ward. (F. N. B. 327.) There is an action, too, where the guardianship itself is recoverable, the writ *de ejectiōe*

her master she was assigned over to her seducer, under indentures of apprenticeship, to learn music of him; and she went and lived with him as his mistress. She was produced by him in Court upon *habeas corpus* sued out by the father. Lord Mansfield said, that the true rule was, that the Court were to judge upon the circumstances of the particular case, and to give their directions accordingly. That, in the case before them, there was no reason for the Court to deliver her to her father: she had received ill usage from him, before she was put out apprentice; he had neglected her while she was with her master, and he had assigned over his parental authority by the indenture of apprenticeship. It was, therefore, ordered, that the girl should be discharged from all restraint, and be at liberty to go where she would. But the Court saw no reason to send an officer with her to protect her upon a mere apprehension or supposition that anybody would behave improperly on the occasion. It was also laid down, that if the circumstances require a change of the custody, it must be delivered in Court. If they do not require it, the privilege *redeundo* is of course, unless the Court should see ground to declare the contrary (i).

Against demand of guardian.

An heiress, aged thirteen, whose father and mother were dead, was living in the house of Sir Robert Viner, with whom she had been left at her mother's death (k). Her aunt being legal guardian obtained a writ of *habeas corpus*, directed to Sir R. Viner, to bring her into Court, and alleged that he had no right to detain the infant, and that he wanted to make up a match for her, though she was already married by her mother. The infant being in Court, chose to stay with Sir R. Viner, and not to go to her aunt or her pretended husband. The Court would not remove her; but ordered Sir R. Viner to permit her aunt and friends to visit

(i) Rule deduced from *R. v. Clarkson*, *R. v. Johnson*, and *R. v. Smith*.

(k) 2 Lev. 128.

her, and to enter into recognisances not to suffer her to marry while she remained with him.

A young lady of years of marriage lived under the care of her testamentary guardian. A man claimed her as his wife, and she was brought into Court upon *habeas corpus* directed to the guardian (l). She denied the marriage. The Court could not try the marriage by affidavit, and they could not deliver her to the man as her husband, without allowing the marriage. She chose to remain with her guardian. The Court, having seen that she was under no illegal restraint, declared that she was at liberty to go where she pleased; and being informed that the man had a design to seize her, they sent a tipstaff home with her, to protect her.

Against demand of pretended husband.

Where the person is too young to have a choice, it becomes necessary to refer to legal principles to see who is entitled to the custody; because the law presumes that, where the legal custody is, no restraint exists; and, where the child is in the hands of a third person, that presumption is in favour of the father or legal guardian.

II. Infant below years of discretion.

Presumption in favour of legal custody.

A father applied to obtain possession of a child of five years of age, which the mother kept from him. There was reason to doubt whether the child was his; he had been divorced from the mother soon after its birth. Lord Kenyon had no doubt but that the father was entitled to the custody, as the Court saw no reason to believe that he intended to abuse his right by sacrificing the child (m).

Delivered to father.

Lord Eldon on *habeas corpus* ordered (n) two children, of the respective ages of five years and seven months, to be delivered to their father by their mother, who was living apart from him, and who claimed the custody of their persons by virtue of a certain deed which provided for their residing with her in the event of a separation, and of another deed, by

(l) *Ree v. Clarkson*, Stra. 444.

(n) *Earl of Westmorland's case*,

(m) *Sir W. Murray's case*, cited Jac. 251, note.

5 East. 223.

which a provision was made for her separate maintenance, and an annual allowance was agreed to be raised and paid to her for the maintenance of the infants.

Habeas corpus was granted (*o*) to bring up a girl of tender years from the custody of her mother, in order to her being returned to the care of a schoolmistress, with whom she had been placed by her father, and removed by the mother's contrivance. There was no suggestion that the child was subjected to improper restraint or confinement.

The mother of three female infants (*p*), the eldest aged five years and a half, left the house rented by her husband, in which she was living with the infants, and afterwards removed them, and instituted proceedings against her husband in the Ecclesiastical Court for a divorce and alimony. Patteson, J., on the application of the father, granted a writ of *habeas corpus* to bring the children before him. Before the return of the writ, a petition was presented to the Vice-Chancellor, praying that it should be referred to one of the Masters of the Court to report who was a fit and proper person to be the guardian. The petition was heard, and dismissed while the *habeas corpus* was depending. Patteson, J., ordered that the mother should deliver up the children to her husband—she refused to give them up. A rule was obtained for an attachment against the mother for her contempt; and the Court of King's Bench refused to set aside the order made by Patteson, J. In this case, the father was stated to be living in adultery, but it did not appear that the children would be in any danger of being brought into contact with the adulteress.

Delivered to
guardian.

A girl not more than nine or ten (*q*), or according to some accounts, six years old, was living with a guardian appointed

(*o*) *Ex parte McClellan*, 1 Dowl. Pract. Ca. 81. (*q*) *Rea v. Johnson*, 8 Mod. 214; Lord Raym. 1334, S. C.; *Stra.*
(*p*) *Rea v. Greenhill*, 4 Ad. & Ell. 624; 6 Nev. & Man. 244, S. C. 579, S. C.

by the Spiritual Court. Such a guardian could of course have no claim to the custody as against a testamentary guardian. The child was brought up on *habeas corpus*, and was delivered to her uncle, the testamentary guardian, being too young to judge for herself.

A dispute as to the custody (*r*) of two children, of the ages of six and nine years respectively, arose between their grandfather and grandmother, to whose care the father had intrusted them during his life, and certain persons whom he had by will appointed guardians, and requested to cause the children to be properly brought up. While a *habeas corpus* was depending, the grandfather and grandmother filed a bill, for the purpose of putting the children under the protection of the Court of Chancery. The Court of Queen's Bench held, that the legal right of the testamentary guardians was as strong as that of a father, and ordered the children to be delivered up to them; intimating at the same time an opinion that some delay might have been allowed if there had been reason to expect a speedy decision in the Court of Chancery as to the custody of the children.

Although the first presumption is, that the right custody according to law is also the free custody; yet if it be shewn that cruelty or corruption is to be apprehended from the father or guardian, a counter presumption arises.

Where cruelty
or corruption
apprehended,

It has been held that the fact of a father having formed an improper connexion, is not of itself sufficient reason for refusing to give him the possession of his children, where there is no reason to apprehend that he will bring them into contact with the woman (*s*).

But the Court has intimated that the right of the father would not be acted upon, where the enforcement of it would be attended with danger to the child; and it has declined to deliver the child to him; where there was an apprehension of

right of father
will not be act-
ed upon.

(*r*) *Res. v. Isley*, 5 Ad. & Ell. 624; *supra*, p. 156; see *Ball v. 441.*

Ball, 2 Sim. 35.

(*s*) *Res v. Greenhill*, 4 Ad. & Ell.

cruelty, or of contamination, by some exhibition of gross profligacy.

Infant given to third person.

On the return to a writ of *habeas corpus* sued out by a father (†), cause was shewn that the detainer was at the desire of the child, who was six years old; and with the mother, who lived separate from the father. The husband, at the Judge's chambers, threatened to take the child by force: the Judge said he would commit him. It appeared that the husband had become bankrupt, and that the mother had separated from him on account of ill treatment; the child was likely to receive an improper education with its father, and was not well used. Lord Mansfield said, "The Court, if the parties are agreed, will make no order. If they disagree, the Court will do what shall appear best for the child: fix on a boarding-school, and the Court will have no objection; let the child in the mean time stay, so that the rule may be made with the concurrence of the family. The natural right is with the father; but if the father is a bankrupt, if he contributes nothing for the child or family, and if he be improper for such conduct as was suggested at the Judge's chambers, the Court will not think it right that the child should be with him."

A father claiming from his wife the custody of their legitimate infant child on *habeas corpus* (u), the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barrister to determine as to the proper custody for the child; the wife (who was in contempt for disobeying the writ) and the husband *consenting* to abide by such determination.

In a modern case in the Court of Common Pleas (x), a husband ill-treated his wife: a separation took place; the wife

(†) *Blisset's case*, Loft. 748. reported with sufficient fulness to

(u) *R. v. Dobbyn*, 4 Ad. & Ell. warrant any inference whatever.
644 n. The circumstances of *R. v.* (x) *Ex parte Skinner*, 9 Moore,
Wilson, there mentioned, are not 278; *infra*, p. 160.

kept her child, which was six years old; the husband cohabited with another woman. The husband sued out a *habeas corpus*. The judge (Best, J.) at chambers, did not order the child to be given up to him, as he thought that, under the circumstances, neither father nor mother was entitled to the custody; but the parties agreed that it should be placed with a third person.

Applications by mothers to take children out of their fathers' custody, there being no charge of cruelty or corruption against the latter, have not been successful.

Applications by mother to take from father having possession, without cruelty or corruption alleged—refused;

Upon an application for a *habeas corpus* by the mother, (y) to bring up a child which had been placed at school, but taken away by the father, Lord Mansfield said that the Court could not at any age take a child from the father; but that as he had constrained himself by articles of separation to let the mother have access to the child, if he chose to take the child home, he must provide for the access of the mother to it there.

—access stipulated for on separation, enforced.

An Englishwoman married a Frenchman domiciled in England, by whom she had one child. (z) She separated from her husband on account of ill treatment, and he by force and stratagem got into the house where she was, and carried away the child, an infant at the breast. The mother obtained a *habeas corpus* upon affidavit, stating these facts, and also stating that she was apprehensive that the father meant to send the child abroad, but without assigning a sufficient reason for her apprehension. Lord Ellenborough, C. J. said, "The father is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the Court will protect the child. But there is no pretence that the child has been injured for want of nurture, or in any other respect." The child was remanded to the custody of the father.

It seems from the language of many Judges, that infants

Infant exposed

(y) *Mr. Litton's case*, cited 5 East. 222.

(z) *Rees v. De Manneville*, 5 East. 281; see Jac. 254, n.; *supra*, p. 146.

to violence will
be taken from
father;

will be protected by the Courts from personal violence, and that if a child be cruelly treated by his father, he will be taken from him upon *habeas corpus*.

—when to cor-
ruption alone,
query;

But whether a child, being in the father's possession, will be taken from him, on account of his having exposed it to contact with improper persons, is extremely doubtful. Lord Eldon considered that a judge on *habeas corpus* attended to nothing but cruelty or personal ill usage to the child, as a ground for taking it from its father. (a)

—refused in ex-
parte Skinner.

In a case, the earlier stages of which have been noticed above (b), the father took the child by fraud from the person with whom it had been placed with the sanction of the Judge at chambers, and was now in gaol, cohabiting with the woman before referred to, who took the child to him every day. The child being brought into Court by a *habeas corpus* sued out by the mother, C. J. Best said, that *Blisset's case* was strong to shew that the power of assigning the custody of a child before the Court of King's Bench was discretionary, if the father appeared to be an improper person to receive it; but that in the present case the father actually had the child, and the Court had no jurisdiction to take it out of such custody and give it to the mother; and he advised an application to the Court of Chancery.

Blisset's case
doubted by Pat-
teson, J.

Mr. Justice Patteson, in a subsequent case (c), observes, that it is laid down in *Blisset's case* that the Court has a power to change the custody of the child, and to take it from the father; that this is the strongest case to be found as to the authority of the Court in similar instances, but that the case was doubted a good deal by the Court of Common Pleas in *ex parte Skinner*; and his lordship seemed almost to doubt whether the Court has authority to interfere even where there is improper restraint upon the child.

(a) Jac. 254, n.; see 2 Bligh, N. 278; *supra*, p. 158.
R, 124.

(c) *Ex parte M'Clellan*, 1 Dowl.

(b) *Ex parte Skinner*, 9 Moore, Pract. Ca. 81; *supra*, 156.

It is to be observed, however, that *Blisset's case* only shews that where the child is not in the father's possession, and he is not a proper person to receive it, the child will not be delivered to him. In *ex parte Skinner*, the child was in the father's possession; he was not a proper person to retain it, but the Court, seeing that it was in his possession, did not take it from him; thus establishing a principle nearly the converse of the principle of the decision in *Blisset's case*, but not at all inconsistent with that decision. It seems, however, to deserve consideration, whether the possession of his child, which the father had obtained by a fraud upon the agreement sanctioned by the Judge, was such a possession as the Court ought to have allowed him to take advantage of.

Distinction between *Blisset's case* and *ex parte Skinner*.

Where an infant below the years of discretion has been taken from the person with whom it was residing, and neither of the parties who claim the custody is legally entitled to it, the Court, on *habeas corpus* usually restores the infant to the custody from which it was originally taken. This course has been adopted in disputes between the parents of illegitimate children, neither of whom has the legal right of guardianship (*d*).

Where no legal custody,

infant below years of discretion restored to old custody.

A putative father obtained, by fraud, possession of an illegitimate child three years old, living in the mother's custody. The Court of King's Bench on *habeas corpus* declared that the putative father had no right to the custody, and ordered the child to be restored to the mother (*e*).

Bastard restored to custody of mother.

In a similar case (*g*), the child being five years old, a rule for a *habeas corpus* was granted; and Lord Kenyon, C. J., remarked that where the father has the custody of the child fairly, the Court would probably not take it away from him;

(*d*) *Rex v. Felton & Wenman*, 1 Bott. P. L. by Const. p. 478, pl. 629. *Supra*, p. 67. (e) *Rex v. Soper*, 5 T. R. 278. (g) *Rex v. Moseley*, 5 East. 224, n.

but where he has got possession of it by force or fraud, the Court will interfere to put matters in the same situation as before.

In a similar case (*h*), the Court of King's Bench, without touching the question of guardianship, which it considered to belong to another forum, granted a *habeas corpus* directed to certain persons who had taken the child from its mother, for the purpose of restoring it to the same quiet custody in which it was originally.

Mother's custody preferred to stranger's.

The mother's custody has been preferred to that of a stranger. An illegitimate child was placed with a nurse by consent of both its parents (*i*). The father removed it, and gave it into the care of another woman, and went abroad, having intrusted a friend with the superintendence of the child. The friend was willing to maintain the child, and the mother was poor, yet the Court of King's Bench ordered it on *habeas corpus* to be delivered to the mother, it not being alleged that the child would be in any danger with her. The Court of Chancery will, if necessary, restrain a father or any other person from suing out a writ of *habeas corpus*, or from prosecuting any writ of *habeas corpus* already sued out, for the purpose of obtaining possession of the persons of infant wards (*k*).

Injunction against proceeding by *habeas corpus*.

Penalties for child-stealing.

It may be proper here to state, that by stat. 9 Geo. 4, c. 81, it is enacted, "That (*l*) if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article

(*h*) *Res v. Hopkins*, 7 East. 579; N. R. 148.

see *Res v. Limington*, 1 Bott. by (*k*) *Mytton v. Holyoake*, *supra*, Const. 408. p. 149.

(*i*) *Ex parte Knee or Keen*, 1 (*l*) Sect. 21.

upon or about the person of such child, to whomsoever such article may belong ; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained, as hereinbefore mentioned ; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years ; and if a male, to be once, twice, or thrice, publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment : Provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof."

By stat. 10 Geo. 4, c. 84, s. 21, these provisions are extended to Ireland.

CHAPTER XVI.

CUSTODY UNDER STAT. 2 & 3 VICT. c. 54.

THE rights of mothers with reference to their infant children, whether at common law, or under the peculiar jurisdiction exercised by the Court of Chancery over its wards, have been already stated. The Legislature, adopting the opinion that those rights fall short of what natural feeling and public policy demanded, has lately given its sanction to a law (*a*) by which, after the preamble "that it is expedient to amend the law relating to the custody of infants," it is enacted,—

Judges in equity may make order on petition for access of mothers to infants; and if under seven, for their delivery to mothers till that age.

I. That it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner, until attaining such age, subject to such regulations as he shall deem convenient and just.

(*a*) 2 & 3 Vict. c. 54.

II. That on all complaints made under this act, it shall be lawful for the Lord Chancellor or the Master of the Rolls in England, and for the Lord Chancellor or the Master of the Rolls in Ireland, to receive affidavits sworn before any Master in Ordinary or Master Extraordinary of the Court of Chancery; and that any person who shall depose falsely and corruptly in any affidavit so sworn, shall be deemed guilty of perjury, and incur the penalties thereof.

Affidavits to be received, and parties deposing falsely, guilty of perjury.

III. That all orders which shall be made by virtue of this act by the Lord Chancellor or the Master of the Rolls in England, and by the Lord Chancellor or the Master of the Rolls in Ireland, shall be enforced by process of contempt of the High Court of Chancery in England and Ireland, respectively.

Orders enforced by process of contempt.

IV. That no order shall be made by virtue of this act, whereby any mother against whom adultery shall be established by judgment, in an action for criminal conversation at the suit of her husband, or by the sentence of an ecclesiastical court, shall have the custody of any infant, or access to any infant, any thing herein contained to the contrary notwithstanding.

No mother against whom adultery has been established, entitled to order.

Two applications have been made to the Court under this act. In one, *In re Shaw* (b), a husband and wife were living apart by mutual consent, under a deed of separation. It appeared that the grandmother, by whom the children were supported, would cease to maintain them, if the mother were allowed access. There were other circumstances affecting the conduct of the mother. The application was refused.

Cases under the act; application of mother refused.

In the other case, *In re Taylor* (c), a wife had left her home, imputing adultery to her husband: before the passing of the act, the husband went to reside in France with his children. The wife instituted a suit for the restitution of

(b) Noticed in argument *In re Taylor*.

(c) See *Jurist*, for Oct. 31 and Nov. 7, 1840.

conjugal rights, and that suit was still pending. A petition was presented to the Lord Chancellor by the wife, praying that such of the children as were under the age of seven might be delivered to and remain with her up to that age, and that she might have free access to the others, under such regulations as the Court should think just. The wife, at the suggestion of the Vice-Chancellor, wrote a letter, retracting the charge of adultery.

The Vice-Chancellor, Sir L. Shadwell, observed, that the mother would have access to her children if a restitution of conjugal rights should be decreed in the suit which was still pending; that decree of itself inferring access to the children. His Honor doubted very much whether the act was meant to be applicable to a case where the husband, *bona fide* before the presentation of any petition by the wife, had removed his children to a foreign country. It seemed to him rather to be inferred from the act, that, as far as the husband and the children were concerned, their residence was to remain the same. Before making an order, directing a mode of access, the Court ought to be reasonably sure that it could carry its sentence into execution; but how, in this case, could it make its order effectual? Upon this ground, and because the suit was still pending in the Ecclesiastical Court, the petition was ordered to stand over, with liberty to apply.

Vice-Chancellor has jurisdiction.

A question having been raised as to the power of the Vice-Chancellor (who is not mentioned in the act) to hear the petition, his Honor decided, that, under the act of 1813, (53 Geo. 3, c. 24), by which his office was created, he had jurisdiction in the matter; also intimated an opinion, that, in any gross case, a power was given by the act, on the ground of necessity, to make an order of access *ex parte*. Service of the petition on the solicitors of the husband, or at his counting-house or country-house, was ordered to be deemed good service.

Discussion as

In the course of the argument, it was insisted, on the

part of the father, that the Legislature had considered, that infants, on whom no property was settled, and who could not therefore be wards of Court, were nevertheless fit objects for its care and protection; that the act leaves the legal right of the father exactly where it found it; that the act applies equally to all infants, whether wards of Court or not, and yet does not require, or even enable, the Court to do anything in the case of wards, which it might not equally have done before; that the jurisdiction existed before within narrower limits, but the principles on which it was exercised were equally applicable to other cases; and, now that the jurisdiction was enlarged, there could be no change of the principles.

to the principle
of the act.

On the other side it was contended, that the intention of the Legislature was to create a right in the mother, to which the Court should give effect in all cases of separation between husband and wife, where the wife had not been guilty of criminal conduct; that this new right must be enforced equally in the case of children who are, and children who are not, wards of Court; and that the contrary construction almost contradicts the preamble, by denying that it has made any alteration in the law relating to the custody of infants.

CHAPTER XVII.

MARRIAGE OF INFANTS.

Age of consent, where under age. **THE** age of consent to marriage is, fourteen in males, and twelve in females. If a boy (*a*) under fourteen, or a girl under twelve years of age marries, this marriage is only inchoate and imperfect; and if either party be under seven years of age, it is absolutely void: where the marriage is inchoate, when either of the parties comes to the age of consent, they may disagree and declare the marriage void, without any divorce or sentence in the Spiritual Court. This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And, in our law, it is so far a marriage, that, if at the age of consent, they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may; and so it is, *vice versa*, when the wife is of years of discretion, and the husband under; the contract being of such a nature as necessarily to imply a right to dissent, at the age when the reason is capable of being exercised. But where there are mutual promises to marry between two persons, one above twenty-one and the other a minor past the age of consent, the former is bound, and is liable in damages

Parties may disagree,

or confirm.

Time of disagreement.

Adult liable for breach of promise to marry infant.

(a) 1 Bl. Comm. 436.

for the non-performance of his promise, though the latter is not (b).

By the common law, if the parties themselves were of the age of consent, no other concurrence was necessary to make the marriage valid; and this was agreeable to the canon law, although, both by that (c) and by the civil law, the consent of parents was requisite for a perfectly regular and solemn marriage. But, by the 4 & 5 P. & M., c. 8, certain penalties were imposed upon persons marrying women under the age of sixteen without consent of parents or guardians, and upon the woman herself, if she assented to such match. (d) By subsequent statutes, penalties were laid on every clergyman who should marry a couple without either publication of banns (which may give notice to parents or guardians) or a license, to obtain which the consent of parents or guardians must be sworn to. Persons combining to procure the clandestine marriage of a minor were then, as now, punishable for conspiracy; yet, up to the middle of the last century, clandestine marriages were very frequent.

Oldlaw.—Marriage without consent of parents was valid, though irregular.

Penalties for clandestine marriages.

Such marriages, though valid, were illegal (e); and, in order to put a stop to such illegal practices, by stat. 26 Geo. 2, c. 33, commonly called Lord Hardwicke's Act, new provisions were made for regulating the publication of banns, and the whole law of marriage; and the act declared (g) null and void all marriages solemnized by license, where either of the parties (not being a widower or widow, who were deemed to have been emancipated,) was under twenty-one, without the consent of the father of the minor, or, if he were dead, of the guardian or guardians lawfully appointed, [that is, it seems, testamentary guardians, and, *perhaps*, guardian in socage, in the case of his ward being married under the age of fourteen], or one of them; if none, then of the mother,

Lord Hardwicke's Act

annulled marriages by license without consent.

Who to consent.

(b) *Holt v. Ward*, Stra. 937.

(c) Per Lord Mansfield, C. J.,

(e) See Canon 62; A.D. 1603. in *Res v. Hodnett*, 1 T. R. 96.

(d) *Infra*, p. 180.

(g) Sect. 11.

if unmarried; otherwise, of a guardian or guardians of the person appointed by the Court of Chancery.

Hard consequences.

Under this statute, marriages by license were frequently annulled for want of consent, sometimes after long cohabitation, and at the suit of the very party by whose fraud the license had been obtained. To remedy this injustice, the

Stat. 3 Geo. 4, c. 75, gives validity to marriages by license without consent prospectively;

and, under certain circumstances, retrospectively.

stat. 3 Geo. 4, c. 75, was passed.

This act repeals (*g*), as to any future marriage, the provision of Lord Hardwicke's Act, by which the marriages by license of minors without consent were declared invalid, and provides (*h*) that such marriages, solemnized before the passing of the act, (that is, before 22nd July, 1822), shall (if not otherwise invalid) be good, where the parties shall have continued to live together as husband and wife till the death of one of them, or till the 22nd July, 1822, or shall only have discontinued their cohabitation for the purpose or during the pending of any proceedings touching the validity of such marriage (*i*).

Exceptions.

The act (*k*) does not render valid any marriage declared invalid by any Court of competent jurisdiction before the 22nd July, 1822, nor any marriage where either of the parties shall, at any time afterwards during the life of the other party (and also before the 22nd July, 1822, for the 3rd section is (*l*) retrospective only) have lawfully intermarried with any other person. Nor any marriage (*m*), the invalidity of which had been established before 22nd July, 1822, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage.

(*g*) Sect. 1.

76; 2 Cr. & J. 66; Roger's Ecol.

(*h*) Sect. 2.

Law, tit. *Marriage*.

(*i*) As to what constitutes "living together" and "discontinuing cohabitation," within this section, see 1 Add. 476; 3 Add. 277; 2 Tyrw.

(*k*) Sect. 3.

(*l*) *Res v. St. John Delphis*, 2 B. & Ad. 226.

(*m*) Sect. 4.

Nor any marriage (n), the validity of which, or the legitimacy of any descendant, has been brought in question, in proceedings in law or equity in which judgments, decrees, or orders have been made before 22nd July, 1822, in consequence of proof having been made of the invalidity of such marriage or the illegitimacy of such descendant.

The right (o) and interest in property and titles of honour which have been enjoyed upon the ground of the invalidity of any marriage, by reason of the want of consent, are not to be in any way affected by this act; although no sentence or judgment has been pronounced in any Court against the validity of such marriage.

The act (p) does not affect anything done before 22nd July, 1822, under the authority of any Court, or in the administration of any personal estate, or the execution of any will, or performance of any trust.

These retrospective provisions are still applicable to marriages of minors by license previous to the 22nd July, 1822. The 1st section came into operation on that day; and, consequently, the marriage of an infant by license without consent, on the 30th August, 1822, was held good (q).

The validity of marriages by banns, from the time when the statute of Geo. 2 came into operation, to 1st September, 1822, is still to be judged of according to the statute of Geo. II.

The 8th and all following sections of the statute 3 Geo. 4, c. 75, were intended for the regulation of all future marriages, whether by banns or by license. In the latter case, consent was required to be signified by writing, attested by two witnesses. These sections came into force on the 1st of September, 1822. On the 26th March, 1823, they were repealed by 4 Geo. 4, c. 17, which enacted, that, until Par-

Retrospective provisions still applicable to marriages by license, previous to 22nd July, 1822.

Marriage by license, without consent, Aug. 1822, valid.

Marriage by banns, up to 1st Sept., 1822, still under 26 Geo. 2.

Certain sections of stat. 3 Geo. 4, c. 75, repealed by 4 Geo. 4, c. 17.

(n) Sect. 5.

(o) Sect. 6.

(p) Sect. 7.

(q) *Ree v. Maria Wankley*,
Moody, Cr. C. 163.

liament should otherwise provide, licenses should be granted and banns published in the manner required by Lord Hardwicke's Act; but that marriages which had been or should be solemnized according to the provisions of 3 Geo. 4, c. 75, should be valid, and that no marriage by license, solemnized as required by either of the acts, should be void for want of the consent of any parent or guardian.

Both repealed
by 4 Geo. 4, c.
76.

The stat. 4 G. 4, c. 76, which came into operation on the 1st of November, 1823, repealed (g) so much of Lord Hardwicke's Act as was then in force, and also the stat. 4 Geo. 4, c. 17; except as to anything done under either of those acts before that day, and except so far as those acts or either of them repeal any former act, or any clause, matter, or thing therein contained.

Whose consent
is required.

This statute lays down many rules relating to publication of banns, and also to marriages by license; and, with regard to the latter, enacts, that the father (r), if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery (s), if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is thereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent.

Application to
Great Seal.

In case (t) the father or fathers of the parties to be mar-

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| (g) Sect. 1. | are the same with those of the present act, see <i>Ex parte Becher</i> , 1 Bro. C. C. 556; <i>Ex parte Woolcombe</i> , Madd. 213. |
| (r) Sect. 16. | |
| (s) As to appointment of guardians to consent to marriage under the provisions of 26 Geo. 2, which | (t) Sect. 17. |

ried, or of one of them, so under age, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is necessary to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse their consent to a proper marriage; any person desirous of marrying may apply by petition to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor, who are respectively empowered to proceed upon such petition in a summary way; and in case the marriage proposed, upon examination appear to be proper, are judicially to declare the same to be so; and such judicial declaration shall be as effectual as if the father, guardians, or mother of the person so petitioning had consented to such marriage.

The provisions of 4 Geo. 4, c. 76, s. 17, do not extend to the case of a father beyond seas or unreasonably withholding his consent, but solely to the case of a father who is *non compos*; and the discretionary power of consent vested in the judges of the Court of Chancery, in case the consent should be withheld unreasonably, or from undue motives, applies exclusively to the case of a guardian or mother so acting (u).

Before a marriage license is granted, where either of the parties, not being a widower or widow, is under the age of twenty-one, one of the parties must personally swear before the surrogate, or other person having authority to grant the license, that the consent of the person or persons whose consent is required by the act has been obtained; but if there be no person or persons having authority to consent, then upon oath made to that effect by the party requiring such license, it may be granted, notwithstanding the want of any such consent (x).

Powers of the Court.

Consent must be sworn to;

—or that there is no one capable of consenting.

If any *caveat* be entered against the grant of any license for a marriage, such *caveat* being duly signed by or on the

Caveat.

(u) *Ex parte S. C.*; 3 M. & C. 471.

(x) Sect. 14.

behalf of the person who enters the same, together with his place of residence, and the ground of objection on which his *caveat* is founded, no license shall issue till the *caveat*, or a true copy, be transmitted to the Judge out of whose office the license is to issue, and until the Judge has certified to the registrar that he has examined into the matter of the *caveat*, and is satisfied that it ought not to obstruct the grant of the license for the said marriage, or until the *caveat* be withdrawn by the party who entered the same.

Marriage by
banns valid
without con-
sent.

Marriage by banns continues to be valid, notwithstanding the absence of consent. No clergyman (*k*) is punishable by ecclesiastical censures for solemnizing marriage after banns published between persons, one or both of whom are under age, without consent of parents or guardians, unless he has notice of their dissent. In case such parents or guardians, or one of them, openly and publicly declare, or cause to be declared, in the church or chapel where the banns are published, at the time of such publication, their dissent to such marriage, such publication of banns is absolutely void.

Stat. 6 & 7 W.
4, c. 85.
Consent.

By the 6 & 7 Will. 4, c. 85, which came into operation (*l*) on the 30th of June, 1837, the like consent is required (*m*) to any marriage in England solemnized by license, as would have been required by law to marriages solemnized by license immediately before the passing of that act; and every person whose consent to a marriage by license is required by law, is thereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by license or without license; in the first of which cases, the certificate is a necessary preliminary to the license; and in the second, the certificate is equivalent to the publication of banns: and (*n*) in case the issue of any such certificate shall have been forbidden in the manner prescribed

Forbiddal.

Effect of cer-
tificate.

(*k*) Sect. 8.

(*l*) See 7 & 8 Will. 4, c. 1.

(*m*) Sect. 10.

(*n*) Sect. 9.

by the act, the notice and all proceedings thereupon shall be utterly void. It is also enacted (o), that before any license is granted by a superintendent registrar, where either of the parties intending marriage, not being a widower or widow, is under the age of twenty-one years, one of such parties must make oath or declaration before him, (among other things), that the consent of the person or persons whose consent to such marriage is required by law has been obtained thereto, or that there is no person having authority to give such consent.

Consent must
be sworn to;

—or that none
authorized to
consent.

Any person on payment of 5s. may enter a *caveat* with the superintendent registrar against the grant of a certificate or a license for the marriage of any person named therein; and if any *caveat* be entered with the superintendent registrar, such *caveat* being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her *caveat* is founded, no certificate or license can issue or be granted until the superintendent registrar has examined into the matter of the *caveat*, and is satisfied that it ought not to obstruct the grant of the certificate or license, or until the *caveat* be withdrawn by the party who entered it. In cases of doubt the superintendent registrar may refer the matter to the registrar general, who must decide. In case of the superintendent registrar refusing the grant of the certificate or license, the person applying for it may appeal to the registrar general, who must thereupon either confirm the refusal or direct the grant of the certificate or license.

Caveat.

Effect of it.

May be referred
to registrar
general.

It is also provided (p), that every person who shall enter a *caveat* with the superintendent registrar against the grant of any license or issue of any certificate, on grounds which the registrar general shall declare to be frivolous, and that they ought not to obstruct the grant of the license, shall be liable

Damages for
frivolous ob-
jection.

for the costs of the proceedings, and for damages to be recovered in a special action upon the case by the party against whose marriage such *caveat* shall have been entered.

Declaration
that objection is
frivolous.

It is enacted by stat. 1 Vict. c. 22 (*q*), that for the purpose of enabling any person to recover costs and damages in any action,"as provided by stat. 6 & 7 W. 4, c. 85, from any person who shall have entered a *caveat* on frivolous grounds with the superintendent registrar, a copy of the declaration of the registrar general purporting to be sealed with the seal of the general register office, shall be evidence that the registrar general has declared such *caveat* to have been entered on frivolous grounds, and that they ought not to obstruct the grant of the license or issue of the certificate, as the case may be; and such declaration shall have the effect of the declaration required in such case by the act of Will. 4.

Effect of
clauses respect-
ing *caveat*.

The 6 & 7 Will. 4, c. 85, s. 37, having enacted, as it seems, that the declaration of the registrar general shall be a ground of action; 1 Vict. c. 22, s. 5, is apparently designed to ascertain the proper evidence to be given of such declaration.

It appears upon consideration of these provisions (*r*), that a parent or guardian may absolutely prevent any marriage of a minor under the 6 & 7 W. 4, c. 85, (either by certificate and license, or by certificate equivalent to banns), by forbidding it in the manner prescribed by that act; and that any person may enter a *caveat* against the issue of a license or a certificate upon which it is intended to found a license, (see s. 13); but that if any person enters a *caveat* upon grounds which the superintendent registrar or the registrar general may deem frivolous, the certificate or license may still issue, and the person entering the *caveat* may be liable for damages in an action upon the case, founded upon the declaration of the registrar general. But surely the dissent of a parent or guardian, even though erroneously expressed by *caveat* in-

(*q*) Sect. 5.

(*r*) See Rogers's Eccl. Law, Tit. *Marriage*.

stead of prohibition, would be deemed a sufficient ground for refusing the certificate or license.

It has also been remarked (*s*), that the only case in which an action can be brought, is where the registrar-general has declared the *caveat* to have been entered on frivolous grounds; but the only cases in which the registrar-general has any cognizance of the question are either where the superintendent registrar has thought the *caveat* well founded, and the parties have appealed to the registrar-general, or where the superintendent registrar has felt so much doubt that he has himself referred the case to the registrar-general; and in either of these cases, it seems unlikely that the grounds of the *caveat* should deserve the appellation of frivolous.

The 16th section of the 4 Geo. 4, c. 76, is merely directory, and a marriage by license where either or both parties are under age, has been held not to be invalidated by the absence of any consent of parent or guardian (*t*).

Marriage by license valid without consent under 4 Geo. 4, c. 76;

By the 25th section of the 6 & 7 Will. 4, c. 85, it is enacted that after the solemnization of any marriage, it shall not be necessary, in support of such marriage, to give any proof of (among other things) the consent of any person whose consent is required by law, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.

and under 6 & 7 Will. 4, c. 85.

But it is still important, with reference to the forfeitures imposed by the existing law, to consider what has been held to constitute consent in suits for nullity of marriage under (*u*) Lord Hardwicke's Act. It appears from various decisions in the Ecclesiastical Courts, that when a marriage takes place, the law presumes that it was with due consent till the contrary appear (*x*). When consent has been once given it can only be withdrawn by a very distinct expression of dissent (*y*).

What amounts to consent.

(*s*) See Rogers's Eccl. Law, Tit. tutes, 662, note.
Marriage.

(*x*) *Balfour v. Carpenter*, 1
Phill. 221, 223; 2 Hag. Con. 173.
(*t*) *Rex v. Birmingham*, 8 B. & C. 29; S. C. 2 Man. & Ry. 230.

(*y*) *Hodgkinson v. Wilkie*, 1
Hagg. Con. 262.

(*u*) See Chitty & Hulme's Sta-

Cannot be with-
drawn by im-
plication.

Consent need not be signified in writing, and it may be presumed from the acts of the party whose consent is required; as where the husband visited the woman at her father's house with his knowledge and approbation, the father having declared that the prospect or the match gave him satisfaction; although he was not privy to the marriage when it actually took place (*x*). Dissent will not be implied from the circumstance, that the parent or guardian of the minor had no personal knowledge of the other party (*a*). But the consent must be precedent to, or contemporaneous with, the marriage, and no subsequent consent has any effect (*b*).

Upon whom the
burthen of proof
lies.

Where, in ejectment (*c*), the plaintiff relies on the invalidity of a second marriage, by reason of a former marriage by license, one of the parties being a minor, and defendant has notice that the question intended to be raised is, whether the first marriage took place with consent of the minor's parent; it lies upon the defendant to disprove consent.

In a prosecution (*d*) for bigamy, when the marriage was by license, and one party was under age at the time, and there was no evidence by the entry in the register or otherwise, that the consent required by stat. 26 Geo. 2, had been given; it was necessary, on the part of the prosecution, to give evidence of such consent.

Consent to mar-
riage of illegiti-
mate minor.

Neither father nor mother, nor both, nor any one, except a guardian appointed by the Court of Chancery, can consent to the marriage of an illegitimate minor (*e*); and under Lord Hardwicke's Act, marriages of such persons with the concurrence of their parents were frequently annulled on this

(*x*) *Smith v. Huson*, 1 Phill. 289, there collected by Mr. Blunt. 306.

(*c*) *Doe v. Price*, 1 Man. & Ry.

(*a*) *Sullivan v. Sullivan*, 2 Hagg. 683.

Con. 241.

(*d*) *Rex v. Butler*, Russ. & Ry.

(*b*) As to what constitutes consent where a legatee is required by 61; *Rex v. James*, Ibid. 17; *Rex v. Morton*, Ibid. 19, n.

will to marry with the consent of certain persons, see *Burleton v. Horner v. Liddiard*, 1 Hagg. Con. 337, 360; *Hankin v. Han-Humfrey*, Ambl. 256, and the cases *kin*, 2 Phill. 323; *Priestly v.*

ground (*g*). It was the practice of the Ecclesiastical Courts not to grant licenses for the marriages of minors on the consent of the father or mother, unless it were also stated that he or she was the legitimate father or mother (*h*); but now consent is dispensed with, where there is no person having authority to give it, and the license may be granted (*i*) upon oath made that there is no person who can consent.

It is usual, however, to apply to the Court of Chancery, and the Court generally appoints the person whom the infant nominates in Court, to be guardian for the purposes of the marriage acts (*k*).

None of the above-mentioned acts extends to the marriage of any of the Royal family; nor beyond the limits of England; nor do they apply to any marriages amongst the people called Quakers, or amongst the people professing the Jewish religion, where *both* the parties are Quakers or Jews respectively (*l*), except that notice must be given to the registrar, and his certificate obtained in the manner prescribed by 6 & 7 Will. 4, c. 85.

Exceptions to marriage acts.

The English law, generally speaking, recognises any marriage which is valid by the law of the country in which it is celebrated, even where one or both of the parties are minors, and usually domiciled in England, and the parents or guardians have not given their consent (*m*). The Irish stat. 9 Geo. 2, c. 11, invalidates marriages and matrimonial contracts without consent of the father or guardian, or the Lord Chancellor; if either party is under twenty-one, and has 100*l.* a-year, real estate, or personalty worth 500*l.*; or if either parent of such party has 100*l.* a-year, real estate, or 2000*l.* personalty. (*n*)

Marriages abroad.
Restrictions on Irish marriages.

Hughes, 11 East. 1.

(*l*) See 2 Phill. 286.

(*g*) See 2 Phill. 92, 327.

(*m*) See *Dalrymple v. Dalrymple*,

(*h*) *Horner v. Horner*, 2 Phill. 349.

2 Hagg. Con. 54; *Ex parte Hall*, 1 V. & B. 111; S. C. 1 Rose, 30.

(*i*) 4 Geo. 4, c. 76, s. 14; 6 & 7 Will. 4, c. 85, s. 12.

(*n*) See Gabbett's Digest, v. i. p. 402.

(*k*) *Supra*, pp. 78, 109.

CHAPTER XVIII.

OFFENCES CONNECTED WITH MARRIAGE.

Forcible abduction of heiress.

THE forcible abduction and marriage of an heiress, of whatever age, was made felony without benefit of clergy by stat. 3 Hen. 7, c. 2, and 39 Eliz. c. 9; but by 1 Geo. 4, c. 115, and ultimately by 9 Geo. 4, c. 31, these statutes are repealed, and it is enacted (*a*), that, where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

Abduction, (not forcible), of girl under sixteen. 4 & 5 Ph. & M. c. 8.

A similar offence, not attended with force, was punished by the stat. 4 & 5 Ph. & M. c. 8 (*b*), which enacts that if any person above the age of fourteen, unlawfully shall convey or take away any woman child unmarried, within the age of sixteen years, from the possession and against the will of the

(*a*) Sect. 19.

(*b*) *Supra*, p. 80.

father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, he shall be imprisoned five years, or fined at the discretion of the justices, and she shall forfeit all her lands to her next of kin, either during her own life or during the life of her husband—for the interpretation of the statute seems doubtful (b).

The stat. 4 & 5 Ph. & M. c. 8, was repealed by the stat. 9 Geo. 4, c. 31, which provides (c), that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the Court shall award.

Repealed by 9
Geo. 4, c. 31.
Its provisions.

It may still, however, be useful, with reference both to this enactment and to the penal clauses of the marriage acts, to consider the interpretation which the stat. 4 & 5 Ph. & M. c. 8, has received (d). It has been resolved that the mother's authority commenced upon the death of the father without having devised the custody of the daughter to any other person, and that the assent of the second husband of the mother was not sufficient to take the marriage of the daughter out of the statute; for the statute annexed the custody to the person of the mother *jure nature*, which was inseparable, and could not by marriage be transferred to her husband, but remained after the marriage only in the mother. Though the daughter was out of the mother's house, which she had left of her own accord six hours before the marriage, she was still in the mother's custody.

Interpretation
of 4 & 5 Ph. &
M. c. 8.

(b) See Ambl. 73; 1 Bro. C. C. 23; 3 Mod. 84; 2 Atk. 63.

(c) 9 Geo. 4, c. 31, s. 20.

(d) 3 Rep. 39 a, *Ratcliffe's case*.

In the case of *Hicks v. Gore* (e), the mother who was guardian, placed her daughter for safe custody with another lady, who caused her own son to marry the girl without her mother's consent. In a trial at bar, the question was whether this was a forfeiture of the daughter's estate. Lord Chief Justice Herbert observed that the statute was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises, or gifts, and married in a secret way to their disparagement, but that no such thing appeared in that case, the marriage being openly solemnized in church, at a canonical hour, in the presence of many persons. The plaintiff was nonsuited.

Upon this case it has been observed (g), that nothing is stated in the report to shew that the Chief Justice laid any stress on the circumstance of the mother having placed the child under the care of the lady by whose contrivance the marriage was effected; and that it deserves good consideration before it is decided that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is not within the statute. For then every school-mistress might dispose in the same manner of the children committed to her care.

Whether consent could be retracted.

There is a loose notice of a *dictum* (h) that there must have been always a refusal to consent, and that consent once given could not be retracted. But this was not the point in dispute, and the Ecclesiastical Courts have not sanctioned this principle (i).

Natural child protected.

It has been decided that under the third section of the act, an information might be granted for taking away a natural child under sixteen from her putative father, as a

(e) 3 Mod. 84.

(h) 3 Mod. 169.

(g) 1 East, P. C. 457.

(i) See 1 Hagg. Con. 262.

person having by lawful means the education and government of her (*k*).

The provisions of stat. 4 & 5 Ph. & M. c. 8, were enacted in Ireland by 10 Car., sess. 3, c. 17. Irish statutes on same subject.

The Irish stat. 6 Anne, c. 16, explained by the Irish stat. 19 Geo. 2, c. 18, imposed severe penalties upon persons guilty of abduction; but the stat. 6 Anne, and (so far as relates to this subject) the stat. 19 Geo. 2, are repealed by 10 Geo. 4, c. 84, which enacts,

(*l*) That if any person shall by force take or carry away any woman or girl against her consent, with intent that such person or any other person shall marry or defile her, every such offender, and every accessary before the fact to such offence, shall be guilty of felony, and being convicted thereof shall suffer death as a felon; and every accessary after the fact to such offence shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years. 10 Geo. 4, c. 84.
Forcible abduction.

(*m*) That when any unmarried girl under the age of eighteen years shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall fraudulently allure, take, or convey away, or cause to be allured, taken, or conveyed away such girl out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, and shall contract matrimony with her, or shall defile her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to such imprison- Fraudulently taking away girl under eighteen, having property.

(*k*) *Rex v. Cornforth*, 11 East, 9, n.; S. C. 1 Bott, by Const. 465; 2 Stra. 1162; *supra*, pp. 42, 80.

(*l*) Sect. 22.

(*m*) Sect. 23.

ment, not exceeding the term of three years, as the Court shall award, and shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such girl; and such property shall, upon such conviction, be vested, from the time of such marriage, in such trustees as the Lord Chancellor, Lord Keeper, or Commissioners for the custody of the Great Seal in Ireland shall appoint, for the sole and separate use of such girl, in the like manner as if such marriage had not taken place.

Abduction of
girl under six-
teen.

(n) That if any person shall unlawfully take or cause to be taken any unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment by fine or imprisonment, or by both, as the Court shall award.

9 Geo. 2, c. 11.
Forfeiture on
marrying mi-
nor without
consent.

And by stat. 9 G. 2, c. 11, which is still in force, persons of full age marrying or contracting to marry persons under the age of twenty-one without the consent of the father, guardian, or Lord Chancellor, are to forfeit £500, if the estate of the person married be of the value of £10,000, and £200 if under that sum, to be recovered by popular action; and are to suffer a year's imprisonment.

Forfeitures in
England in
case of perjury
or fraud, by 4
G. 4, c. 76,
s. 23.
When marriage
by license, by
false oath or
fraud, one or
both being un-
der age, guilty
party to forfeit
property accru-
ing from mar-
riage.

Although a valid marriage may now take place without the consent of parents and guardians, yet the stat. 4 G. 4, c. 76, imposes heavy forfeitures. It is provided (o),

That if any valid marriage solemnized by license shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, contrary to the provisions of the act, by means of such party falsely swearing as to any matter or matters to which such party is thereby required personally to swear, such party wilfully and knowingly so swearing; or if any valid marriage

(n) Sect. 24.

(o) Sect. 23.

by banns shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person as aforesaid under the age of twenty-one years, had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this act, and having knowingly caused or procured the undue publication of banns;—it shall be lawful for the attorney-general, (or the solicitor-general, in case of a vacancy,) by information, in the nature of an English bill, in the Court of Chancery or Court of Exchequer, at the relation of a parent or guardian of the minor, whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, such parent or guardian previously making oath as is thereby required, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest in any property as shall then have accrued or shall thereafter accrue to such offending party, by force of such marriage, shall be secured under the direction of such Court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage; and if both the parties so contracting marriage shall, in the judgment of the Court, be guilty of any such offence as aforesaid, it shall be lawful for the said Court to settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as the said Court, under

Suit by information in Chancery or Exchequer.

Order of Court thereupon.

Before information filed, case to be made out to attorney or solicitor general on oath

the particular circumstances of the case, shall think reasonable; regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other:

provided also, that no such information as aforesaid shall be filed, unless it shall be made out to the satisfaction of the attorney or solicitor general, before he files the same, by oath or oaths sworn before one of the Masters in Ordinary in Chancery, or before one of the Barons of the Exchequer, that the valid marriage to be complained of in such information hath been solemnized in such manner and under such circumstances as in the judgment of the attorney or solicitor general are sufficient to authorize the filing of the information under the provisions of the act; and that such marriage has been solemnized without the consent of the party or parties at whose relation such information is proposed to be filed, or of any other parent or guardian of the minor married, to the knowledge or belief of the relator or relators so making oath; and that such relator or relators had not known or discovered that such marriage had been solemnized more than three months previous to his or their application to the attorney or solicitor general.

Agreements, settlements, &c. previous to such marriage, void.

All (p) agreements, settlements, and deeds, entered into or executed by the parties to any marriage, in consequence of or in relation to which marriage such information as aforesaid shall be filed, or by either of the said parties before and in contemplation of such marriage, or after such marriage, for the benefit of the parties or either of them, or their issue, so far as the same shall be contrary to or inconsistent with the provisions of such security and settlement as shall be made by or under the direction of such Court as aforesaid, under the authority of this act, shall be absolutely void and have no force or effect.

(p) Sect. 24.

Any (r) original information to be filed for the purpose of obtaining a declaration of any such forfeiture as aforesaid, shall be filed within one year after the solemnization of the marriage by which such forfeiture shall have been incurred, and shall be prosecuted with due diligence; and in case any person or necessary party to any such information shall abscond, or be or continue out of England, it shall be lawful for the Court in which such information shall be filed, to order such person to appear to such information and answer the same, within such time as to such Court shall seem fit; and to cause such order to be served on such person at any place out of England, or to cause such order to be inserted in the London Gazette, and such other British or foreign newspapers as to such Court shall seem proper; and in default of such person appearing and answering such information within the time to be limited as aforesaid, to order such information to be taken as confessed by such person, and to proceed to make such decree or order upon such information as such Court might have made, if such person had appeared to and answered such information: provided always that in case the person at whose relation any such suit shall have been instituted, shall die pending such suit, it shall be lawful for the Court of Chancery, if such Court shall see fit, to appoint a proper person or proper persons at whose relation such suit may be continued.

Information to be filed within one year.

Proceedings where parties abscond, or are abroad.

Proviso in case of death of relator.

The Court has no discretion (s) given to it by the act to mitigate the penalty, but is bound to declare the forfeiture in the words of the act, and to refer it to the Master to inquire what estate, right, title, or interest in any property the wife was entitled to at the marriage, or has subsequently acquired, and to secure the same under the direction of the Court; and also to refer it to the Master to approve of a proper settlement of such property, and all future property which the wife may acquire during the coverture, for the benefit of the wife, or the issue of the marriage, or either of them.

Court has no discretion to mitigate penalty.

(r) Sect. 25.

(s) *Att.-Gen. v. Mulla*, 4 Russ. 329.

These provisions apply to marriage under 6 & 7 Will. 4, c. 85.

It is provided by stat. 6 & 7 Will. 4, c. 85,

That (*t*) if any valid marriage shall be had under the provisions of that act, by means of any wilfully false notice, certificate, or declaration, made by either party to such marriage, as to any matter to which a notice, certificate, or declaration is therein required, it shall be lawful for the attorney-general or solicitor-general to sue for a forfeiture of all estate and interest in any property accruing to the offending party by such marriage; and the proceedings thereupon and consequences thereof shall be the same as are provided in the like case with regard to marriages solemnized by license before the passing of that act, according to the rites of the Church of England.

The law as to one part of this subject has been well stated by Sir Edward East (*u*).

Ravishment of ward.

"By the ancient law and by stat. West. 2 (13 Ed. 1. c. 35), the marriage of a ward without the consent of the guardian, was a ravishment of the ward (*x*). But stat. 12 Car. 2, c. 24, which abolished wardships, seems to have superseded this provision; and the 8th section which enables fathers to dispose of the guardianship of their children under age, though it gave an action of ravishment of ward or trespass, against such as wrongfully take away or detain such children, for the recovery of them, and for damages for their use and benefit, yet is silent as to any corporal punishment of the ravishers.

Marrying minor without consent;—seemingly not indictable.

"It has been said upon good consideration (*y*), that if a man marry a woman under age without the consent of her father or guardian, that alone will not render it indictable at com-

(*t*) Sect. 43.

(*u*) 1 East. P. C. 459.

(*x*) 2 Inst. 440. 2 P. W. 110.

(*y*) *Rex v. Marriot*, 4 Mod. 145;

Moor's case, 2 Mod. 130; *Rex v. Blackett and Others*, 7 Mod. 39; *Rex v. Twisleton and Others*, 1 Lev.

257; 1 Sid. 387; 2 Keb. 432, 8;

Rex v. Thorp and Others, Carth.

384; 5 Mod. 221; 12 Mod. 516;

Com. 27; *Rex v. Pierson and*

Others, Andr. 310; Stra. 1107, S.

C.; *Rex v. Story*, 3 Keb. 101; *Rex*

v. Furas, B. R. temp. W. & M.

M.S. Tracy.

mon law; for that marriage being lawful in itself, though restraints may be laid upon it by positive laws, yet where no such law is enacted or transgressed, the bare act of such a marriage cannot be punished as a crime, however grievous it may be to a parent; and I cannot find any case where an indictment has been maintained for such an act without other circumstances. There are, it is true, *dicta* to be found in the books, which may seem to countenance such an opinion; but the cases when examined do not warrant it to so general an extent. In Twisleton's case, upon which most stress has been laid, the information, which was against several, charged not only a conspiracy, but a deceitful and riotous taking away; though the latter did not appear to have been proved; and after objection taken, and before final judgment, the defendants were bailed by consent.

"But however this may be, if children be taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any other corrupt or improper practices, as by intoxication, for the purpose of marrying them; though the parties themselves may be consenting to the marriage, such criminal means will render the act an offence at common law; for marriage ought to be free and voluntary, without any compulsive or sinister procurement."

Conspiracy to marry, indictable;

In the case of *Rex v. Green* (z), the Court granted a rule *nisi* for an information for a conspiracy and taking away from his father's house a young man of fortune under age, for the purpose of marrying him to one of the conspirators, though the young man was not heir-apparent to his father; and it may be generally laid down upon the authority of the precedents collected in that case, and of the more recent case of the Wakefields, punished for the abduction of Miss Turner (a), that the law is as stated by Sir Edward East.

—though the infant is not heir-apparent.

(z) *Rex v. Green*, 3 Doug. (a) Tried at Lancaster Spring Assizes, 1827.

Conspiracy to seduce.

Seduction may be attended (b) with such circumstances as to make it an indictable offence. A case is reported (c) where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c. of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and further, the defendants were charged that, in prosecution of such conspiracy, they took away the Lady Henrietta at night, from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady, and to the evil example, &c. The defendants were found guilty, though there was no proof of any force, but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shewn that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control.

And in a more modern case (d), a father obtained a rule against Sir Francis Delaval, along with an attorney, and a music master (to whom his daughter of the age of eighteen or nineteen was apprenticed), for a conspiracy to debauch the girl under the forms of law.

(b) 1 East, P. C. 460; Russell (d) *Rex v. Delaval and Others*.
on Crimes, B. 3, c. 8. 3 Burr. 1434; S. C. 1 W. Bl. 410,
(c) *Rex v. Lord Grey and Others*, 439.
3 Harg. St. Tr. 519. A. D. 1682.

CHAPTER XIX.

MARRIAGE OF WARD OF COURT.

BEFORE the marriage of a ward of Court of either sex, it is necessary to apply by petition for a reference to the Master, to inquire whether the match is suitable, to ascertain the fortune of the ward, and to approve of a settlement. If the Master's report is favourable, the Court will give the infant leave to marry (a), but not if the settlement proposed is improper (b); and even the consent of the ward's father or guardians does not supersede the necessity of applying to the Court, and will not induce the Court to sanction the marriage, unless it is satisfied with the settlement (c).

Application for leave.

Settlement must be approved.

Application indispensable.

In cases where clandestine marriage is apprehended, hearsay evidence has weight, if uncontradicted, (this indeed must be so in all proceedings upon affidavit); and in such a case, although the mere fact of marrying a ward of Court without leave of the Court is always a contempt, a general order will be made that an infant shall not be married without leave of the Court, and that certain persons shall have no access to him or her by letter or otherwise (d).

Prevention of clandestine marriage. Hearsay attended to.

Order against marriage.

The Court will assist a guardian to prevent an improper marriage of the infant. In Lord Raymond's case (e), the Lord Chancellor ordered that the ward should continue in the care and custody of his guardians, and that they should

Guardians appointed.

(a) See the form in *Earl Plymouth v. Lewis*, 2 Dick, 801. (d) *Beard v. Travers*, 1 Ves. 313.

(b) *Smith v. Smith*, 3 Atk. 305. (e) Ca. temp. Talb. 58.

(c) 2 Russ. 28.

not permit him to marry without the consent of the Court; and he ordered the father of the lady who was likewise under age, and not a ward of Court, not to suffer her to marry the infant without the like consent.

Name of person intended to be married, inserted in order against marriage.

Guardians of infant not ward of Court, ordered to prevent marriage with ward of Court.

Communication with ward restrained.

What will be deemed service of order.

Interference against guardian.

When there is an application against any particular person to restrain him from marrying an infant, it is usual to insert his name in the general order against marrying her. A petition having been preferred by a mother on behalf of her daughter (*f*), (an infant ward of Court entitled to an estate under a settlement, subject to a proviso restraining her from marrying without her mother's consent), and B., the person petitioned against, being likewise an infant, Lord Hardwicke made an order (as in the case of the young lady whom Lord Raymond was prevented from marrying) that whoever had power over him as guardian, should not permit him to marry the young lady without leave of the Court; that B. should produce such letters as imported a promise of marriage by the young lady, and that the mother should be at liberty to examine him on interrogatories.

Upon affidavits of an intended marriage (*g*) with a male infant aged eighteen, an order was made that the woman (who was of full age) should attend in Court; and she was restrained from all communication with the infant in the mean time. She could not be served with the order, and Lord Eldon granted an injunction, restraining her from all communication with the infant till further order, and directed that service of the injunction at the house which appeared to be her last place of abode should be good service.

The Court will interfere against a guardian, either in the way of prevention or of punishment. In the old case of *Foster v. Denny* (*h*), the testamentary guardian (a stepmother) having

(*f*) *Smith v. Smith*, 3 Atk. 304; (*g*) *Pearce v. Crutchfield*, 14 Ves. 206.
see *Lady C. Annesley's case*, *supra*, p. 153.

(*h*) 2 Ch. Ca. 237.

married very meanly, Lord Chancellor Nottingham, at the same time that he ordered the child (who had been eloiigned) to be brought home, observed, that here being a guardian by act of Parliament, he could not remove her ; but in that and all other the like cases they should give security not to marry the child *infra annos nubiles*, or consent or be aiding to the marriage of such *post annos nubiles* during minority, without acquainting the Court ; but that he could not restrain the infant from marrying *ad annos nubiles*.

—made to give security not to marry ward.

In the case of *Vernon v. Vernon*, the infant being conversant with the daughter of the guardian, the Lord Chancellor directed, on petition, that he should be immediately sent for, and ordered forthwith to Eton School (*i*).

Ward taken from guardian by way of prevention;

In a case, of which the circumstances are not reported (*k*), Lord Hardwicke took the care of an infant from her testamentary guardian, and ordered that she should not marry without the leave of the Court.

Where a mother (*l*), who had been appointed by the Court to be guardian of her infant daughters, wards of the Court, had endeavoured to marry the younger improperly, and the elder was alleged to have been married at Paris, Lord Hardwicke, upon the petition of the infants, left the alleged husband of the elder to recover her at law if he could, and ordered the mother to let them both be placed with a person approved by the Court, with the usual directions that they should not marry without the leave of the Court, and restricted them from receiving any letters or message from particular persons mentioned in the order.

—and on account of marriage.

Where one of two testamentary guardians took the infant from a boarding-school and married her, at the age of nine years, to his own son, who had no estate, and was of a mean

Ward taken from guardian by way of punishment.

(*i*) Gilb. Eq. Rep. 173; 2 P. W. S. C. Dick. 88; and see *Lord Shipbrook v. Lord Hinchinbrook*, Ibid.

(*k*) *Tombes v. Elers*. Dick. 88. 547.

(*l*) *Roach v. Garvan*, 1 Ves. 158,

Information against guardian, though infant no ward of Court.

Mere fact of marriage is contempt in all concerned. Punished by commitment, and sometimes prosecuted at common law.

The nature of the guardianship does not affect the contempt.

Marriage without leave, how notified to Court. Reference.

trade; the Lord Chancellor, on motion, ordered the guardian to bring the infant into court, and then committed her to the other guardian; and directed an information to be brought against the guardian who had disparaged her (*m*). In this case the infant had not been placed under the care of the Court by any bill filed before the marriage, and therefore the Lord Chancellor did not consider the guardian to have been guilty of any direct contempt in marrying her.

To marry a ward of Court without the consent of the Court, is a contempt, punishable in all parties concerned, by commitment, at the discretion of the Court (*n*); and in gross cases a prosecution at common law for conspiracy or perjury will be ordered, for which purpose the Lord Chancellor has frequently directed the papers to be laid before the Attorney-General, in order that he might consider whether an information ought not to be filed (*o*).

The contempt is just as great though the father be alive, or though the guardian has not been appointed by the Court (*p*).

Where a ward has been married without leave, any one may bring the circumstance under the notice of the Court by petition; and a reference will be ordered to the Master, to inquire whether a marriage has taken place, and to approve of a settlement.

(*m*) *Goodall v. Harris*, 2 P. W. 561; *Pearce v. Crutchfield*, 16 Ves. 48; *Nicholson v. Squire*, 16 Ves.

(*n*) *Herbert's case*, 3 P. W. 116; 259; *Ball v. Coutts*, 1 V. & B. 292; *Birkett v. Hibbert*, 3 M. & K. 227; *Re Walker*, ca. temp. Sug. 299.
 (*o*) *Priestley v. Lamb*; *Millet v. Rouse*; *Pearce v. Crutchfield*, 14 Ves. 206, 16 Ves. 48; see also, *Nicholson v. Squire*, *Ball v. Coutts*, *Wade v. Broughton*, 3 V. & B. 172.
 (*p*) 2 P. W. 116.

419; *Bathurst v. Murray*, 8 Ves.

Commitment is used as an expedient for compelling the husband to make a proper settlement; and a reference must be made for a settlement before the contempt can be cleared. He is generally discharged (*q*) on undertaking to make such a settlement as the Court shall order (*r*); but even his submission will not procure his discharge, if a prosecution has been directed (*s*), nor (where there is no prosecution) until the Lord Chancellor thinks that he has been sufficiently punished for the contempt (*t*).

Commitment used to compel settlement.

Discharge on undertaking to make it,

if the Court thinks the punishment sufficient.

A man may, under such circumstances, either be committed to close confinement, or be allowed the rules of the prison (*u*).

Confinement may be close.

A marriage in fact, whether valid in law or not, amounts to contempt (*x*); and ignorance of the infant's being a ward of Court is no excuse, as all the world are bound at their peril to take notice of causes depending. But this ignorance may perhaps induce the Court to look more favourably on the case, if the marriage was not otherwise improper (*y*).

Marriage is contempt, whether valid or not. Ignorance does not excuse.

Where a couple were married in Scotland on the same day on which a bill was filed for making the lady a ward of Court, both parties being foreigners, natives of the island of Martinique, where the property was situated, the Lord Chancellor did not commit the husband, yet he took upon him the jurisdiction as for contempt, and compelled a settlement accordingly (*z*). The power of the Lord Chancellor

Time no bar to punishment.

(*q*) *Stephens v. Savage*, 1 Ves. J. 173; *Butler v. Freeman*, Ambl. 301; 154; *Stackpole v. Beaumont*, 3 Ves. *Bathurst v. Murray*, 8 Ves. 74.

89; *Millet v. Rowse*, 7 Ves. 419. (*x*) *Bathurst v. Murray*, *ubi su-*

(*r*) *Stackpole v. Beaumont*, *ubi supra*; *Warter v. Yorke*, 19 Ves. 451; *Salles v. Savignon*, 6 Ves. 572; 386. *Re Walker*, ca. temp. Sug. 299.

(*s*) *Priestley v. Lamb*, 6 Ves. 420. (*y*) *Mr. Herbert's case*, 3 P. W. 116; *More v. More*, 2 Atk. 157;

(*t*) *Bathurst v. Murray*, 8 Ves. 74. Anon. 4 Russ. 473.

(*z*) *Salles v. Savignon*.

(*u*) *Hughes v. Science*, 2 Atk.

either to commit for contempt or to order a prosecution for conspiracy, is not impaired by the circumstance that the Court has not been informed of the transaction till many years after it occurred; though the Court would, of course, exercise a judicious discretion in such a case (*a*).

Where settlement would be exacted from a father.

Where a father has been concerned in improperly procuring a match with a ward of Court for his son, the Court would probably compel him, if he is a man of property, to make a reasonable settlement in the marriage (*b*). Where a foreigner is the contriver of such a match abroad, the Court, it seems, will punish him, if he afterwards comes within its jurisdiction (*c*).

Foreigner punishable here.

Sequestration against peeress.

A sequestration has issued against a peeress for procuring the marriage of her son aged fourteen, without the consent of his testamentary guardian, or of the Court (*d*).

Justice struck out of the commission. Barrister prohibited from practising.

A person (*e*), who was a justice of the peace and a barrister at law, having assisted, under very disgraceful circumstances, in the marriage of a ward of Court, was closely imprisoned for several weeks, and was struck out of the commission of the peace, and prohibited from practising at the bar.

No commitment, where favourable circumstances.

Where a marriage of this sort has taken place with consent of friends, or otherwise under extenuating circumstances, the Court generally refrains from commitment, on the husband's undertaking to attend before the Master and propose a settlement.

Infant committed.

An infant having clandestinely married a ward of Court, was committed for contempt (*g*). He petitioned to be discharged, offering to settle her real and personal estate upon her when they should both come of age. It was ordered that a receiver

(*a*) 1 V. & B. 302.

2 R. v. My. 639.

(*b*) *Bathurst v. Murray*, 8 Ves. 74.

(*e*) *Hughes v. Science*, Appendix I., 2 Atk. 173; see also *Butler v.*

(*c*) *Roach v. Garvan*, 1 Ves. 158.

Freeman, Ambl. 301.

(*d*) *Eyre v. Shaftesbury*, 2 P. W.

(*g*) *Edes v. Brereton*, West, 348. 110; see *Mr. Long Wellesley's case*,

of her real and personal estate should be appointed, and that the husband should be restrained from conveying, disposing, or alienating any part of his wife's real estate, without the consent of the Court. In the case of *Hughes v. Science* (h), a similar order was made upon the husband, who was an old man, and had been guardian of the infant; and he was also ordered to bring before and leave with the Master all mortgages, bonds, and other securities belonging to the estate of the infant, upon oath.

Husband restrained from alienating property of ward.

If the marriage of a female ward has been reported by the Master to be invalid, the Court generally orders the parties to be re-married in proper form (i).

Invalid marriage of female ward;
re-marriage ordered;
intercourse restrained.

Where the ward was a female, and there were doubts of the validity of the marriage, the husband, being committed to the Fleet, was restrained from receiving her visits, and she was compelled by the Court to withdraw herself from his connexions (k).

But where a male infant has been entrapped into an improper marriage, a different course has frequently been pursued.

Secus of male ward;—

Where there had been an attempt (l) to marry a male ward of Court, but the marriage was reported by the Master to be invalid, a suit for nullity of marriage was ordered at the expense of the infant's estate. In this case, and in another case (m), where the infant's father had instituted a suit to have the marriage declared null, all the parties to the transaction were restrained by injunction from all intercourse, personal, by correspondence, or otherwise, with the infant.

Suit for nullity ordered; intercourse restrained.

A woman of bad character had entrapped a male ward of

Court of Chancery restrains

(h) *Supra*, p. 196.

(l) *Butler v. Freeman*, Ambl.

(i) *Bathurst v. Murray*, 8 Ves. 301.

74; *Re Walker*, Ca. temp. Sug. 299.

(m) *Bathurst v. Murray*.

(k) *Warter v. Yorks*, 19 Ves. 451.

from proceeding
in Spiritual
Court.

Court into a marriage (n) with her, and had obtained from the Ecclesiastical Court certain orders upon the guardian of the infant for payment of alimony out of the infant's allowance, and a sentence of excommunication against the guardian for disobedience, and against the infant for not receiving his wife. Lord Hardwicke said that a guardian, receiving a certain sum for an infant's maintenance, would be liable to the censure of the Court of Chancery if it were applied to any other purpose, and he ordered that the woman should be restrained from proceeding in the Spiritual Court against the guardian for alimony, or against the infant himself for restitution of conjugal rights and alimony; and that she should consent in the Spiritual Court to the removal of the sentences of excommunication.

Orders parties
to do certain
acts in Spiritual
Court.

Imprisons, to
compel obedi-
ence;

In a similar case (o), where the father of the infant had established a suit in the Ecclesiastical Court, in order to have the marriage declared null, and the pretended wife had been committed by the Court of Chancery for contempt, she refused to appear in the Ecclesiastical Court, and to put in an answer to the libel, so that the suit might proceed. Lord Hardwicke, after she had been four months in prison, offered to discharge her, if she would appear to the suit; but she refused these terms, and was discharged after remaining under commitment three months longer; his Lordship having observed that the imprisonment must not be perpetual.

—but not for
ever.

Party under
commitment
heard on peti-
tion.

Parties under commitment can only be heard on petition. Generally speaking, a party who is in contempt must pay the costs of the contempt before he can clear himself (p).

Who to pay
costs of con-
tempt,

In the case of *Hughes v. Science* (q), a party concerned in procuring the marriage was discharged, on undertaking to pay the whole expense of the proceedings against him.

(n) *Hill v. Turner*, 2 Atk. 315.

(p) *Nicholson v. Squire*, 16 Ves.

(o) *Butler v. Freeman*, Amb. 259.

301.

(q) Appendix I., 2 Atk. 173.

In the case of *Butler v. Freeman* (r), a person who had been committed for contriving the marriage, was discharged, on paying the costs of his contempt.

In a case of flagrant contempt, the Court refused to give the husband any costs of the proceedings connected with the settlement, and directed the costs of the other parties to come out of the fund in Court (s). and settlement

Where a male ward of Court had been entrapped into an invalid marriage, his estate was ordered to bear the costs and expenses out of pocket of the clergyman who attended by order of the Court to give explanations, and also the costs of a suit of nullity of marriage (t). and suit for nullity.

In a case of contempt, where the Court upon the husband's petition reformed the settlement approved by the Master, and made it more favourable to the husband, the husband was ordered to pay the costs of the petition (u).

In a case of very slight contempt, the husband having no property of his own, was allowed out of the fund, along with the other parties, his costs of the proceedings in making a settlement of the ward's fortune (x).

A woman of weak mind (y), supposed to be an infant, being seduced from her friends in order to marry, a writ *de homine replegiando* was granted. On her being afterwards married, (although no ward), the husband and the clergyman were committed to the Fleet by Lord Cowper. It being afterwards discovered that she was neither an idiot nor under age, they were discharged. Possibly they were committed for disobeying the writ *de homine replegiando*. Commitment for marrying woman not a ward.

A general act of pardon (z), though with an exception of "all contempts and offences for which any prosecution was Contempt pardoned by

(r) Ambl. 301.

(x) Anon. 4 Russ. 473.

(s) *Millet v. Rouse*, 7 Ves. 419.

(y) *Ex parte Ashton*, Dick. 23 ;

(t) *Warter v. Yorke*, 19 Ves. 451. A. D. 1713-14.

(z) *Phipps v. Earl of Anglesea*,

(u) *Birkett v. Hibbert*, 3 My. & K. 227. 1 P. W. 696.

general act of
pardon.

then depending, and which had been prosecuted at the charge of any private person or persons," has been held to include contempt in marrying infant wards of Court (a).

In approving
of marriage, pe-
cuniary consi-
derations not
regarded.

If the person applying for leave to marry a ward of Court is of good character, it is no objection to the match that he is without fortune, or that the ward will make a pecuniary sacrifice in marrying him (b).

(a) It appears from Kempe's Loseley Papers, (London, 1836), that the celebrated Dr. Donne, being at the time a layman, and secretary to Lord Keeper Egerton, clandestinely married a young lady in her seventeenth year, daughter to Sir G. More, and niece to Lady Egerton; that the Keeper dismissed Donne from his office, and committed him, (Feb. 1602), to the Fleet; Christopher Brooke, who gave the lady away, being committed to the Marshalsea by the Court of High Commission, and S. Brooke, the clergyman who officiated, being also imprisoned; that the prisoners had two offences to answer for: first, the offence against the canon law, in marrying the girl without the consent of her father; and, secondly, the civil offence, for which the Lord Keeper had committed Donne, and had taken from Christopher Brooke certain recognisances with sureties to the amount of £1100, which would prevent him from joining the circuit at York without the Keeper's permission, even if the Commissioners should order him to be discharged.

(b) *Curtis v. Wilson*, Reg. Lib. 1831 A, fo. 3071; 1833 A, fo. 890.

CHAPTER XX.

SETTLEMENT ON MARRIAGE OF WARD OF COURT.

THE questions relating to settlements on the marriage of wards of Court, have generally arisen in the case of female wards. It seems almost impossible to deduce from the decided cases any general conclusions as to what the Court may in any particular instance hold to be a proper settlement (a).

(a) See Martin's Conveyancing, by Davidson, vol. iv. p. 467.

The following provisions are contained in a modern settlement, approved by the Master, previous to the marriage of a ward of Court. (The fortune of the lady amounted to about £3500 in possession, and £2000 in reversion, besides contingent interests, of little value, in considerable sums.) The husband to make up the sum of £3500 to £10,000 sterling, and on the marriage to become entitled to the reversionary and contingent interests of the wife. The £10,000 to be invested in the names of trustees, who are, out of the interest, to pay to the wife during the joint lives of her and her husband a sum equivalent to the interest of £3500, for her separate use: the interest of the £10,000 (so subject) to the husband for life, then to the wife for life, and on the death of the

survivor the fund is to go to the children of the marriage and their issue, as the husband and the wife, or the survivor, shall appoint; and in default of appointment, equally, with clauses for maintenance, &c. In default of issue taking a vested interest, the trustees are, after the death of the survivor, to hold two-fifths of the fund, as the wife shall appoint by deed or will; and, in default of appointment, for her next of kin; the residue to the husband's appointment, &c. in the same manner. Power of revocation as to one-half of one-third of the trust funds in case of the wife marrying again, and she is empowered to appoint it to a second husband and the issue of a second marriage; and in default of such issue taking a vested interest, it is to go to the children of the first marriage, as if there had been no second marriage.

Settlements derive no additional force from sanction of Court.

It seems that settlements made under the sanction of the Court take effect, like other marriage settlements of infants, only as contracts of the adult party; and that their provisions do not derive from the approval of the Court any authority or force which does not belong to them by the general rules of law.

On the marriage of a female infant who was a ward of Court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the Court, giving to trustees a power to sell the estate. A sale made by the trustees under the power, during the minority of the lady, was held by Sir J. Leach, M. R. to be invalid (b).

Where husband has no property to settle.

It was stated in the Master's report, in the case of *Chas-sing v. Parsonage* (c), that where the husband has no fortune to settle, the Court has thought fit, upon the treaty for the marriage, to narrow the husband's interest to one-half of the produce of her fortune, in case he survives her, and there are children.

Provision for future marriage;

Where a female ward of Court marries a man who has property of his own to settle, the Court, whether there has been contempt or not, will not allow the wife's fortune to be tied up for the children of that marriage, but will take care to enable her to provide for a future marriage (d); and it is not sufficient that the settlement should contain powers for the wife to provide for a second husband and children out of her real estate, because she may lose her husband and marry again before she attains the age of twenty-one, and she cannot (e) execute powers over her real estate during her infancy. The consent of the infant and her guardians does not affect the rule of the Court, and a proposed settlement of the ward's whole fortune on the children of the marriage has been disapproved of, even where the intended husband

—exacted, notwithstanding consent of infant and guardians.

(b) *Simson v. Jones*, 2 R. & My. *Halsey v. Halsey*, 9 Ves. 471. 366.

(c) 5 Ves. 18.

(e) *Howle v. Greenbank*, 1 Ves. 298; 3 Atk. 693, S. C.

(d) *Wells v. Price*, 5 Ves. 398;

had an annual income of £900, which was not capable of being settled (*g*).

A female ward of Court, when she comes of age, may make any settlement of her property, and may give effect to it by consenting personally in Court, or under a commission for the purpose; but where this is not done, the Court will still protect her interests, and will not part with her property until a suitable provision is made for her (*h*).

Ward on coming of age may settle and give effect by consent.

Court will not otherwise dispense with settlement;

In the case of a settlement made before marriage upon a ward who had attained twenty-one, Lord Eldon referred it to the Master, to inquire whether it was a proper settlement (*i*).

—but will refer to Master,

A young lady, who had been a ward, married without any settlement, the very day after she came of age; her property was afterwards settled on her and her husband for their lives, and on the children of the marriage absolutely; but the wife never confirmed the settlement by her personal consent in Court. After the death of the husband, and the birth of a child, the settlement was, at the suit of the wife, declared void, as making no provision for a second marriage, and partly also on the ground of surprise, and a reference was made for a new settlement (*k*). But as it turned out that she had consented in Court to the transfer of a certain sum of stock to her husband, that part of the transaction was not disturbed.

and declare existing settlement void;

especially on the ground of surprise.

If there has been a marriage of a ward under age, and an antenuptial settlement, and she comes in after her majority, and consents (apart from her husband) to that settlement, the Court will confirm it, and not make a reference to the Master to approve of a settlement (*l*).

Antenuptial settlement by infant;

confirmed, if she consents.

(*g*) *Gordon v. Irwin*, 4 Bro. P. 123, n.

C. ed. Toml. 355.

(*k*) *Long v. Long*, 2 S. & S.

(*h*) *Ball v. Coutts*, 1 Ves. & B. 119.

300.

(*l*) *Leeds v. Barnardiston*, 4 Sim.

(*i*) *Austin v. Halsey*, 2 S. & S. 538; see Ca. Temp. Sug. 326. In

Where there is contempt,

there must be reference.

Settlement by husband regarded.

Where a ward of the Court is married without its consent, it compels the husband, by process of contempt, to make a proper settlement; and there must be a reference to the Master for this purpose, before the contempt can be cleared (*m*). In cases of contempt, the interest which the husband will be allowed to take in the wife's property, rests entirely in the discretion of the Court. Where a man of no property marries for the sake of the wife's fortune, he is liable to be excluded entirely from the enjoyment of it; yet even where there has been such a marriage under circumstances of great impropriety, a portion of the wife's income is sometimes given to the husband during coverture. But where this species of indiscretion has occurred, which the Court must punish by commitment, but which brings together persons of equal rank and fortune, and as considerable a settlement is made by the one as by the other, some attention is paid to an equivalent provision made by the husband for the wife and issue (*n*).

the case of *Gullin v. Gullin*, (Reg. Lib. 1834, A. fo. 329 & 763, 7 Sim. 236,) a female ward of Court, in whose name the sum of £216 4s. 4d. 3 per cent. stock, was standing in a certain cause, married in Scotland; and, being still under age, joined her husband in a petition that the stock might, after the sale of so much as should be sufficient to answer the costs of the application, be transferred to the husband. The wife's consent having been taken by commission, and an affidavit having been made that there was no marriage settlement, the Vice-Chancellor made the order. The stock, even before its necessary diminution by the costs of the application, did not

exceed the value of £200; and it is settled (see *Foden v. Finney*, 4 Russ. 428,) that the husband may obtain payment of any sum below that amount without his wife's consent. Supposing the husband's right to have required the wife's confirmation, it is not easy to see upon what principle she was allowed to give her consent; for her examination apart from her husband could only remove the disability created by coverture, and not that arising from infancy.

(*m*) *Stevens v. Savage*, 1 Ves. jun. 164; *Ball v. Coutts*, 1 V. & B. 300.

(*n*) See 1 V. & B. 303; *Ca. Temp. Sug. 325*; *Bathurst v. Murray*, *infra*, p. 206.

In a case of contempt (o) in marrying a ward of Court, Settlement, where contempt not gross. where there were extenuating circumstances, a settlement of her personal property to the husband for life, then to the wife for life, then to the children according to the appointment of the survivor, was directed to be varied so as to vest a moiety of the personal estate in the children at the death of the wife, if she should die before the husband, but subject to the power of appointment in the settlement (p); the Lord Chancellor thinking it right that a man should have a proper control over his own family.

In a case of contempt, not said to be flagrant (q), it was proposed to settle the wife's fortune to her separate use for life, with power for her, in case the husband should survive, to give him the interest of a moiety for his life; the principal to the children of the marriage according to her appointment, and if there should be no child, to her next of kin, with power for the husband and wife to settle a part on the marriage of any child, and for the wife, if she should survive, to settle a moiety upon her children by any other marriage. The Master of the Rolls directed the insertion of a power for the wife to settle the interest of a moiety of her fortune upon any future husband for life.

Where a man without property had married a ward without leave (r), there being no circumstances of aggravation, his costs of the proceedings in making a settlement of his wife's fortune were ordered to be paid out of the fund, as well as those of the other parties.

Upon a marriage with a ward of Court under very gross circumstances (s), the Court refused to allow the husband's debts, contracted in the maintenance of his wife and children, to be paid out of the accumulations of her fortune

(o) *Stevens v. Savage*, 1 Ves. jun. 154.

(p) *Ibid.*

(q) *Winch v. James*, 4 Ves. 386.

(r) *Anon.* 4 Russ. 473.

(s) *Chassaing v. Parsonage*, 5 Ves 14.

since the marriage, and the Master of the Rolls intimated that he could go no further than to allow a settlement to the wife's separate use for her life, and after her death to her children, with a power to her to give the husband a part during his life.

Settlement in
gross cases.

Where the husband had obtained a license upon a false oath, that the ward, who was in her fifteenth year, was of age, and he was afterwards, by order of the Court, indicted and convicted, and underwent the pillory and imprisonment (*t*), the Lord Chancellor required that the fund should be transferred to the Accountant-General, with a trust declared to pay the dividends to the wife's separate use for life, from time to time, and not by way of anticipation; and after her decease, the capital to go among all her children by that or any other marriage; if she should die without children in her husband's lifetime, according to her appointment by will; and in case she should make no appointment, to her next of kin: if she should survive, according to her appointment by deed or will; and if no appointment, to her, her executors, &c. Under these provisions, the wife might, in the case of there being no children, give the fund by will to her husband surviving her. The husband was not allowed his costs.

A ward had been induced at the age of sixteen to go through a form of marriage (which was afterwards regularly solemnized by order of the Court) with a person of low condition (*u*). Lord Eldon said that there could not be much expectation of happiness where the husband had nothing, and the wife had the whole control over the property; and her income being £800 a-year, his Lordship directed a settlement giving £150 a-year to the husband during the coverture, and the rest to the wife's use, with power

(*t*) *Millet v. Rouse*, 7 Ves. 419.

(*u*) *Bathurst v. Murray*, 8 Ves. 74.

to her by will to increase his annuity to £300, if he should survive her. He disapproved of a proviso, that, in the event of a second marriage, two-thirds or one-half, according to the number of children, should be absolutely settled upon the child or children of that marriage, and substituted a power for the wife to charge in such a way, that each child of the second marriage should take a share not exceeding that of each child of the first. The wife having by the proposed settlement a power of appointment in case of her death in the life of her husband above the age of twenty-one, without children, (so that she still had the power of giving the property to him if she thought fit), the limitation in default of appointment was directed to be to her next of kin, exclusive of the husband.

Where (x) the husband, at the time when the marriage was concerted between him and his father, was a clerk in a solicitor's office, entirely without property or expectations, and when he had been committed for the contempt, the Master approved of a settlement by which no power of appointment in default of issue was given to the wife, but the whole was absolutely given over to her next of kin, so that not only her then husband, but also any after taken husband, was excluded from all benefit. Lord Chancellor Brougham, on the husband's petition, considered that the ward's interest alone was to be consulted in the settlement, unless the subordinate purpose of protection against the husband could be accomplished without any prejudice to the ward. His Lordship directed the insertion of a power for the wife to appoint by will, if she should die in her husband's life, leaving no issue of that marriage, with a trust in default of appointment, for her next of kin; and in the event of the husband's death in his wife's lifetime leaving no issue of the marriage, that it should be at her own disposal;

(x) *Birkett v. Hibbert*, 3 My. & K. 227.

but in case of her marrying a second time, leaving issue of the first marriage, she was to have a power to give to each child of the second marriage a sum not exceeding that which the issue of the first marriage had. The husband was ordered to pay the costs of the petition.

Husband not allowed to depart from agreement made on reference.

The husband of a ward of Court being under commitment for marrying her (y), agreed before the Master, on reference for a settlement, to accept £2000, and to release all right and interest in the residue of her fortune, the amount of which was taken by estimation. Afterwards he was not allowed, on the suggestion that the estimation was not fair, and that he ought to have had more than the £2000, to attend the Master in taking the accounts by which the wife's fortune was to be ascertained, the Lord Chancellor considering that he had given up for £2000 all his interest in the residue, whatever it might be.

Husband having undertaken to make settlement, compelled, notwithstanding wife's consent.

A man was committed for marrying an infant ward of the Court of Chancery, whose fortune consisted of a rent-charge for her life; but being in the army, he was discharged upon undertaking to make a proposal for a settlement (z). The husband, as he had so undertaken, was not permitted to take his wife's fortune upon her consenting in Court, but was ordered to make a proposal for a separate provision for her.

Marriage and wife's fortune in Court, settlement supported against husband's creditors.

The Court will not allow the creditors of the husband to take from it the power of making a proper settlement.

A man ran away with a young lady of the age of fifteen, and married her in Scotland (a). On the day after the marriage, a bill was filed, in order to make her a ward of the Court, and her fortune was paid into Court. A child was born. The husband assigned his wife's property for valuable consideration. The husband and wife separated; a settle-

(y) *Pearce v. Crutchfield*, 16 Ibid. n.

Ves. 48.

(a) *Like v. Beresford*, 3 Ves.

(z) *Stackpole v. Beaumont*, 3 Ves. 506; see 1 V. & B. 295.

38; and see *Lespinasse v. Longden*,

ment was executed by the husband under the sanction of the Court, by which a certain interest in the wife's property was given to the husband if he should survive her ; and this settlement was supported against the assignee.

Where a ward of Court had been married (*d*) and a settlement had been made both by husband and wife, under which the children had vested interests, the settlement was not disturbed as to the children, but as between husband and wife it was varied, giving to the latter, notwithstanding alleged misconduct by her, an increase of pin-money, (independent of alimony), and also some interest in future property.

(*d*) *Ball v. Coutts*, 1 V. & B. 292.

CHAPTER XXI.

MAINTENANCE BY STATUTE.

POOR PERSONS RELIEVED BY THEIR PARENTS AND CHILDREN.
ORDERS TO BE MADE AT QUARTER SESSIONS,
 —or Petty
COMPRISED ONLY LEGITIMATE RELATIVES BY BLOOD.
NOW EXTENDED TO WIFE'S CHILDREN;

BY stat. 43 Eliz. c. 2, s. 7 (a), it is enacted that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person in that manner and according to that rate as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein.

By 59 G. 3, c. 12, s. 26, justices in petty sessions are entitled to make order for relief upon the person liable. Though the father be living, yet, if he be unable, the burden devolves upon the grandfather, &c. if of ability.

The statute of Elizabeth extends only to natural and legitimate relations, and not to illegitimate relations, or persons connected merely by affinity; and formerly a man was not obliged to maintain his wife's children by a former marriage, either during her life or after her death (b). But now, by 4 & 5 W. 4, c. 76, s. 57, it is provided that every man who shall marry a woman having a child or children at the time

(a) See 4 Burn's Justice, ed. D'Oyley, 233.

(b) *Tubb v. Harrison*, 4 T. 118; *Cooper v. Martin*, 4 East, 76.

of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall for the purposes of this act be deemed a part of such husband's family accordingly.

—whether legitimate or not,

—till the age of sixteen,
—or death of wife.

By 4 & 5 W. 4, c. 76, s. 71, it is provided (c), that every child which shall be born a bastard shall have and follow the settlement of the mother of such child, until such child shall attain the age of *sixteen*, or shall acquire a settlement in its own right; and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family, until such child shall attain the age of *sixteen*; the liability of the mother to cease on the marriage of the child, if a female.

Bastards follow settlement of mother till sixteen.

Mother liable to support them.

Liability to cease as to females on marriage.

And in case (d) of the mother's inability, the Court of Quarter Sessions may make an order upon the putative father for the support of the child until it shall attain the age of *seven*.

Putative father liable if mother unable,
—till the age of seven.

Even if the mother and the child have different settlements, the bastard, like all other children, shall go with the mother for nurture until the age of seven years, as a necessary appendage of the mother, and inseparable from her (e).

Child inseparable from mother till seven.

The law on this subject is thus stated by Blackstone (g):
“No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only

(c) See 4 Burn's Justice, ed. *Steffrath v. Walford*, 2 Sess. Ca. D'Oyley, 416. 90; 2 Bott, 4; *supra*, pp. 67, 142.

(d) S. 72.

(g) 1 Bl. Comm. 449; and see

(e) See *Cripplegate v. St. Saviour's*, 2 Bott, 13; 1 Nol. P. L. 287; Russ. 22. the observations of Lord Eldon, 2

obliged to find them with necessaries, the penalty on refusal being no more than twenty shillings a month; for the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence, but thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours."

CHAPTER XXII.

MAINTENANCE ORDERED BY COURTS OF EQUITY.

SECTION I.

Proceedings on Application for Maintenance.

WHERE an infant has property of his own, and his father is dead or is not able to support him, he may be maintained out of the income of his property, (if his interest in it be absolute), by the person in whose hands the property is, or a stranger may maintain him; and a Court of Equity will allow all payments made for this purpose, which can be shewn to have been proper and reasonable. It has become usual, however, to insert in wills and settlements by which property is given to infants, clauses authorizing the application, at discretion, of the income of the fund, for their maintenance, and of the capital, or some part of it, for their advancement, even while their interest in the fund is not absolutely vested; and where such a discretion is given, it will not be controlled, unless the trustees obviously intend a fraudulent or mischievous use of it, or waive their right to decide (a). But whether the infant is entitled under an instrument containing such authority, or not, trustees and guardians may relieve themselves of

Where it is applied for.

(a) See *Livesey v. Harding*, 3 Madd. 396; *Collins v. Vining*, 1 Tambl. 460; *French v. Davidson*, C.P. Cooper, 472.

all responsibility by obtaining the previous sanction of the Court for the payments which they propose to make.

Where reference ordered without suit.

The usual application is, for a reference to the Master to approve of a proper sum for the infant's maintenance (*b*); and in particular cases a reference for this purpose will be ordered upon petition, without a bill being filed (*c*); and the costs of the petition will be allowed to the guardian in his accounts (*d*). But it was observed by Lord Eldon, in *Ex parte Mountfort*, that the course has been not to order maintenance upon petition only, except in special cases, as where there is a specific fund for maintenance, or where the property is small. A bill must be filed, where it is not certain what the fund will be out of which the allowance is to be made, or where it is necessary to take accounts in the Master's office (*e*).

Where a bill must be filed.

So where trustees have a discretionary power as to maintenance (*g*), and it is sought to control that discretion. But if they decline to exercise their own discretion, the Court will act as if no discretionary power had been given to them (*h*); and in one such case an order was made for maintenance and advancement without bill and without reference (*i*).

A bill must be filed where the infant has not an absolute interest (*k*); and where it is a question whether he is entitled to maintenance at all, or not. There is indeed a

(*b*) It is usual to state to the Master upon what plan it is proposed to conduct the infant's education. The money allowed for maintenance is generally ordered to be paid to the person who has the care of the infant for the time.

parte Swift, 1 R. & My. 575; *Ex parte Starkie*, 3 Sim. 339; *In re Christie*, 9 Sim. 643.

(*d*) *Ex parte Salter*, *ubi supra*; *Ex parte Thomas*, Ambl. 145.

(*e*) *Corbet v. Tottenham*, 1 Ba. & B. 60.

See pp. 128, 128, *supra*.

(*g*) *Ibid*.

(*c*) Seton on Decrees, p. 278; *Ex parte Whitfield*, 2 Atk. 315; Cooper, 492.

(*h*) *Collins v. Vining*, 1 C. P.

Ex parte Salter, 3 Bro. C. C. 500; (*i*) *Ex parte Chambers*, 1 R. & My. 577; *infra*, p. 252.

Ex parte Myerscough, 1 J. W. 161; (*k*) *Fairman v. Green*, 10 Ves. 47.

Ex parte Lakin, 4 Russ. 307; *Ex*

case (*l*) where Lord Eldon entertained this question, but refused, upon the merits, to order maintenance.

Where maintenance is ordered on petition, it is assumed that the party accountable for the income will, of his own accord, comply with the order. His obedience cannot be compelled without a suit (*m*).

A distinction has been made between real and personal estate as to the amount of property which makes it requisite to file a bill.

First, as to personal estate.

1. As to person-
alty.

In *Ex parte Myerscough*, Sir Thomas Plumer, M. R., ordered a reference for maintenance upon petition, where the property was stated to be about £200 per annum; and in *Ex parte Lakin*, Sir John Leach, M. R. made a similar order, where the income was more than £200 a-year, and observed, that unless the rule was otherwise fixed by the Lord Chancellor, he should entertain such petitions where the income did not exceed £300 a-year.

Amount of pro-
perty;

—not to exceed
£300 a year.

In a recent case (*n*), Sir L. Shadwell, V. C., said, that he thought the distinction as to making orders on petitions without suit, between cases where the income was above or below £300 per annum, was without foundation in principle; and he made an order, on petition, without suit, for the allowance of £450 a-year, (which the Master had approved of,) for maintenance out of personal estate yielding an annual income of £1500.

Amount disre-
garded.

Secondly, as to real estate.

2. As to real
estate.

A guardian in socage may apply the infant's income to his maintenance, but he does so upon his own responsibility, and at his own peril (*o*), and therefore it is advisable in his case, as in that of other guardians, to secure the sanction of the Court. Formerly, when an infant was entitled to real estate, an order might be obtained for mainten-

Guardian in
socage main-
tains at his
peril.

(*l*) *Ex parte Kebble*, 11 Ves. 606.

(*o*) *Ex parte Whitfield*, 2 Atk.

(*m*) See p. 106, *supra*.

315.

(*n*) *In re Christie*, 9 Sim. 643.

Where maintenance allowed without suit.

Not where property exceeded £100 a-year. But now more liberally given.

The reason.

Maintenance without a reference, if property small.

ance on petition only, although the property was worth £200 a-year (*p*). But in *Ex parte Mountfort* (*q*), where the infant had a freehold estate, Lord Eldon said, apparently having real property in contemplation, that, as a general rule, if the infant had £100 per annum, a bill should be filed. In *Ex parte Molesworth* (*r*), Lord Gifford, M. R., after conferring with the Lord Chancellor, stated, that maintenance would not be allowed without a bill filed to an infant entitled to real estate, where the estate was of more value than £100 a-year. But in a later case, where the infant had freehold estates of the annual value of £260 (*s*), Sir L. Shadwell, V. C., said, that Lord Eldon had, during the latter part of his judicial life, refused to make an order for a reference as to maintenance out of an infant's freehold estate, without suit; but that he could never discover the reason for such refusal, as the order discharged the party making the payment, to the extent only of the allowance made; and his Honor directed a reference to be made according to the prayer of the petition.

Exceptions will not lie to a Master's report of maintenance (*t*).

Where the property is small, maintenance will be ordered without a reference; as in the case of two infants having no property except the sum of £298, and copyholds worth £6 per annum (*u*), and of three infants having only the sum of £1200 among them (*x*), and of infants having property not exceeding £20 a-year each (*y*), and of an infant having £1000 and no more (*z*).

(*p*) *In re Man*, Seton on Decrees, 282.

(*q*) 15 Ves. 445.

(*r*) 4 Russ. 307, n.

(*s*) *Ex parte Starkie*, 3 Sim. 339.

(*t*) *Ex parte Nicholls*, 1 Bro. C.C. 577; *supra*, p. 107.

(*u*) *Ex parte Green*, 1 J. & W. 283.

(*x*) *Ex parte Dudley*, Id. 264, n.

(*y*) *Kilpatrick v. Kirkpatrick*, cited Set. on Dec. 281; *supra*, p. 143; see also *Payne v. Lou*, 1 R. & My. 223; *Ex parte Swift*, Id. 575; *Ex parte Chambers*, Id. 577; see p. 109, *supra*.

(*z*) *Re Allop*, 1 C. P. Cooper 283.

Sums paid by an executor out of the rents of an infant's real estate for his maintenance, cannot be allowed by the Master under a direction "to make unto the parties all just allowances" on taking an account of the testator's real estate (a); but it seems that the maintenance must be expressly referred to the Master.

Maintenance cannot be allowed to executor without express reference.

Besides the common jurisdiction of Courts of Equity on the subject of maintenance, they have under certain statutes a special jurisdiction, which they exercise on the same principles by which they are guided in ordinary cases.

By stat. 1 Wm. 4, c. 65, it is enacted (b), that it shall be lawful for the Court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money by virtue of any act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said Court, to direct all or any part of the dividends due or to become due in respect of such stocks, or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of such Court, for the maintenance and education, or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment; and the receipt of such guar-

Court of Chancery may order dividends of stock belonging to infants to be applied for maintenance.

44. It is stated, in a note to this case, that "in *Ex parte Mince*, M.R., May, 1821, the infant's property amounted to £28 a-year, but an order without a reference was refused." It appears, however, from Reg. Lib. 1820, B. fo. 994, that the income was £28; that the prayer of the petition was only that A.W. might be appointed guardian of the person and property of the petitioner during her minority; or that it might be referred to the Master to approve of a proper person to be guardian; and that A.W. was appointed guardian without a reference.

(a) *Cotham v. West*, 1 Beav. 381.

(b) Sect. 32, founded upon 6 G. 4, c. 74, s. 12.

dian or other person for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.

Powers may be exercised by Court of Exchequer.

By another section (c) it is provided, that the powers and authorities given by the act to the Court of Chancery may be exercised by the Court of Exchequer.

Where an infant had no guardian (d), but his father was living, Sir L. Shadwell, V. C., after considering whether the Court of Chancery had jurisdiction in such a case under s. 32, directed, on the petition of the father, that the dividends on stock belonging to the infant should be paid to the father for the maintenance of the infant.

The funds over which this authority is most usually exercised are either legacies to infants which have been paid into Court, and invested in the funds, under the provisions of stat. 36 Geo. 3, c. 52, s. 32, or sums of money belonging to infants, which have been paid in and invested under railway and local acts (e).

The Legislature has also thought fit to entrust the Court of Chancery with another jurisdiction, of which Blackstone gives the following account (g) :

“ As nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted (h), that if any popish parent shall refuse to allow his protestant child a fitting maintenance,

(c) Sect. 37.

(d) *In re Naish*, Ap. 29, 1840; 18 Law Journal, 252.

(e) The usual provisions are, that the purchase money of property taken for the purposes of the act, if belonging to an infant, shall, if it amounts to £200 or upwards, be paid into the Court of Exchequer, and applied under the direction of the Court; that if it is above

£20, and under £200, it shall either be paid into Court, or (if the guardian thinks fit) be paid to trustees; and that if under £20, it shall be paid to the guardian for the use of the infant. See the Metropolis Improvement Act, 3 & 4 Vict. c. 87, ss. 44, 45, 46.

(g) 1 Bl. Comm. 449.

(h) Stat. 11 & 12 Wm. 3, c. 4.

with a view to compel him to change his religion, the Lord Chancellor shall by order of Court constrain him to do what is just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish; and therefore in the very next year we find an instance of a Jew of immense riches, whose only daughter having embraced Christianity, he turned her out of doors; and on her application for relief, it was held she was entitled to none (i). But this gave occasion (k) to another statute (l), which ordains, that if Jewish parents refuse to allow their Protestant children a fitting maintenance suitable to the fortune of the parent [and the age and education of the child], the Lord Chancellor, on complaint, may make such order therein as he shall see proper (m)."

SECTION II.

Where maintenance is allowed, the Father being alive.

It becomes necessary next to consider out of what funds maintenance will be allowed. Not generally allowed to father;

Generally speaking, a father must, if he can, maintain his infant children, whatever their circumstances may be, and no allowance will be made to him for this purpose out of their property (n).

(i) Lord Raym. 699. The order of magistrates for relief was quashed, not because she was entitled to none, but because it did not state that she was poor, or likely to become chargeable to the parish.

(k) Com. Jour. 18 Feb., 12 Mar. 1701.

(l) 1 Ann. st. 1, c. 30.

(m) See *Vincent v. Fernandes*, 1 P. W. 524; where it was thought that the age of the child was immaterial.

(n) Set. Dec. 285; *Faulkner v. Watts*, 3 Atk. 408; *Jackson v. Jackson*, Ibid. 514; *Butler v. Butler*, 3 Atk. 80; *Darley v. Darley*, Ibid. 399; *Stocken v. Stocken*, 4 M. & C. 95; *supra*, p. 145.

—otherwise,
where fund
given to him
for mainte-
nance.

But where a fund is expressly given to a father for the maintenance of his child, this amounts to a legacy to the father, and he is (as between himself and the parties liable to pay it,) entitled to it in his own right, whatever his means may be, and although he does not spend it all in maintaining the child (o).

Or where he
has contracted
that property
shall be so ap-
plied.

It is also competent (p) for a father to contract that certain property shall be applied to the maintenance and education of his children; and he has a right to have such a contract strictly enforced in his own favour, without reference to the question of his ability; and this, not only where maintenance is provided for by settlement of the wife's fortune, which but for that settlement would have become the husband's, but also where it is provided for out of a fund which would not necessarily have belonged to the wife; for the consideration of marriage constitutes the husband a purchaser, and the benefit of the trust for maintenance is part of his contract.

Allowed where
father unable.

If the father is not able to maintain his children, the Court will order maintenance for them out of their own property.

Ability com-
parative.

Where the question turns upon the father's ability, maintenance is given, not upon his insolvency only, but whenever he is not in such circumstances as to be able to give the child an education suited to the fortune which he enjoys or expects (q).

Reference as to
ability.

The father's ability is generally the first point in the reference to the Master on the subject of maintenance.

Where dispens-
ed with.

A reference as to the ability of the father is sometimes dispensed with, even where there is no gift to him, and no

(o) See *Hughes v. Hughes*, 1 Bro. 4 M. & C. 95; S. C. 4 Sim. 162, C. C. 386; *Andrews v. Partington*, 2 M. & K. 489. The doctrine 3 Bro. C. C. 60; 2 Cox, 223, S. C.; recognised, *Kekewich v. Langston*, *Hawkins v. Watts*, 7 Sim. 199. V. C. Dec. 1840.

(p) *Mundy v. Earl Howe*, 4 Bro. (q) *Buckworth v. Buckworth*, 1 C. C. 224; *Meacher v. Young*, 2 Cox, 80. M. & K. 490; *Stocken v. Stocken*.

contract: where the facts already before the Court shew that the father cannot maintain his children, or that he cannot give them a suitable education. Where he has become bankrupt, or insolvent, or is in reduced circumstances and has deserted the children, maintenance is ordered without a reference as to his ability (*r*).

In the case of *Hoste v. Pratt* (*s*), where, by a hard construction of a will, some children were provided for and others excluded, and the family was large and increasing, and there was an express direction for maintenance, Lord Loughborough thought the father entitled to an allowance for maintenance without any reference as to his ability, and laid stress at first upon the direction for maintenance; but on the case of *Andrews v. Partington* being mentioned, he enlarged upon the hardship of the case, and said that the ability of the father must depend upon the number of the children; and he directed the Master to have regard to that circumstance. He also referred to the case of Mr. Mundy's daughter (*t*), where he had made an order for maintenance, though the father was, beyond all doubt, of ability. But the father's right in that case to have his child maintained rested entirely upon contract; and Lord Loughborough himself said, in deciding the case, "It is perfectly clear, from the cases, that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child."

Dispensed with
in *Hoste v. Pratt*.

Where fund
given as a bounty,
father must
maintain notwithstanding
provision for
maintenance.

This principle is sanctioned by the authority of *Hughes v. Hughes* (*u*), and *Andrews v. Partington* (*x*), and has been expressly recognised by Lord Gifford, M. R., in a modern

(*r*) *Kilpatrick v. Kirkpatrick*, 3 Ves. 729.
Set. Dec. 298; *supra*, p. 143; *Ex parte Mountfort*, 15 Ves. 445; *Walker v. Shore*, Ibid. 122; *Re England*, 1 R. & M. 499; see also *Ex parte Dudley, Payne v. Low, Ex parte Swift*, *supra*, p. 216.
(*s*) *Mundy v. Earl Howe*, 4 Bro. C. C. 224.
(*t*) *Mundy v. Earl Howe*, 4 Bro. C. C. 224.
(*u*) 1 Bro. C. C. 387; see p. 223, *infra*.
(*x*) 3 Bro. C. C. 60; 2 Cox, 223.

and education, it would seem that such sums are not payable if the father is of ability (*k*).

Allowed where
child taken
from father.

Where the Court takes away from the father the care and custody of the children, it does not call in aid of their own means the property of the father, and it directs a reference for maintenance out of their own fortunes, whatever may be the circumstances of the father (*l*).

Allowed with-
out considera-
tion of mother's
ability.

In the case of *Hughes v. Hughes* (*m*), the Lord Chancellor said, the practice was to refer it "to the Master to inquire whether the *parents* were of ability to maintain the children;" but it has since been decided, that, if the father is alive and not of ability, maintenance will be allowed; without considering the ability of the mother, though she may have a separate income (*n*).

Doubts have been entertained (*o*) as to allowing maintenance, without regard to the ability of the mother, where she continues unmarried after the death of the father. But maintenance will now be allowed in such a case, whether directed or not (*p*). So where she has married again (*q*).

The Court will not, on account of the misconduct of a wife, provide for her children out of her separate property (*r*).

(*k*) *Hughes v. Hughes*, 1 Bro. C. 408; *Billingsley v. Critchet*, 1 Bro. C. 387; *Livesey v. Livesey*, 3 Russ. C. C. 268.

287. (*p*) *Lanoy v. Duchess of Athol*, 2

(*l*) *Wellesley v. Duke of Beaufort*, 2 Russ. 1; see p. 143, *supra*. Atk. 447; *Ex parte Lord Petre*, 7 Ves. 403; see *Beasley v. Magrath*, 2 Sch. & Lef. 35.

(*m*) 1 Bro. C. C. 388.

2 Sch. & Lef. 35.

(*n*) *Haley v. Bannister*, 4 Mad.

(*q*) *Billingsley v. Critchet*, *Greenwell v. Greenwell*, 5 Ves. *ubi supra*; *Ex parte Penloaze*, 1 Bro. C. C. 387, n.; *Cavendish v. Mercer*, 5 Ves. 195, n.

Ves. 195, n.

(*r*) In the matter of *Anne Wal-*

(*o*) See *Faukner v. Watts*, 1 Atk. *ker*, Ca. temp. Sug. 299.

SECTION III.

Maintenance allowed on the principle of Compensation.

HITHERTO it has been assumed that there are funds applicable to the infant's maintenance, and that the only question is, whether the father is to be relieved of his *prima facie* liability to support his child. But it is necessary also to inquire, without any reference to the father's liability, what funds are actually available for maintenance.

Where there are equal legacies (*r*) to a class of children not otherwise provided for, and for whom it would be beneficial that maintenance should be allowed; in such a case, though the words of the will do not authorize the application of interest to the maintenance of the infants, or even though there is a direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship in case of the death of any under that age, the chance of surviving being equal among all, and there being no other interest that upon any contingency would take effect;—the Court, if it can collect before it all the persons who may be entitled to the fund, so as to make to each a compensation by the immediate maintenance given, for the diminution of the fund to which he may eventually become entitled, will maintain them all out of the interest.

Allowed where infants have the whole among them.

But where the legacy is not given absolutely to the children and the survivor, but there is a gift over to a stranger, this principle cannot be applied without the consent of the stranger.

I. Not allowed where gift over to stranger.

Where therefore maintenance was sought (*s*) on behalf of five infants, to whom a residue was bequeathed, with survivorship among them in case of the death of any under the age of twenty-one; and in case all of them should die under that age, the whole was given to their sister, who took no

(*r*) See 11 Ves. 606; 14 Ves. 204; 2 Swanst. 436.

(*s*) *Ex parte Kibble*, 11 Ves. 604.

interest directly in that residue ; but a legacy was given to her by the same will ; and in case of her death under the age of twenty-one, her legacy was given over to the other five children, and the will gave no direction as to maintenance:—The application was refused ; for the five children would have been maintained at the sister's expense, as she had no interest in common with them, and stood as a stranger.

Where a man gave legacies to his two grandchildren at twenty-one, with interest from the end of a year after his death, with survivorship between them, and a gift over of principal and interest in case of both dying under twenty-one without issue, Sir W. Grant refused to allow maintenance for the grandchildren (*t*). He observed, that the case “ did not fall within the principle of *Greenwell v. Greenwell*, in which case there was no consent, all being infants ; but the fund was to go among them all.” This remark shews that he admitted the rule which has been laid down, though he was not accurately informed of the facts (*u*).

A man devised his real estate to the first and other sons of his daughter in tail male, with remainders over ; and directed that his personal estate, and the monies arising from his real estate, should be accumulated, and paid to such son or daughter of his daughter as should first attain twenty-one (*x*). Lord Thurlow refused maintenance to the eldest son out of this contingent legacy.

Lands were devised (*y*) to the use of a father for life with remainder to the use of his children, equally, as tenants in common in tail, with cross remainders between them, with remainders over.

The father became bankrupt, and the lands were purchased by trustees under a local act of Parliament, and the

(*t*) *Errington v. Chapman*, 12 Cox, 80.

Ves. 20.

(*y*) *Ex parte Whitehead*, 2 Yo. &

(*u*) See p. 227, *infra*.

J. 243.

(*x*) *Buckworth v. Buckworth*, 1

value of the interest of the children was assessed by a jury, without reference to the value of their father's life estate, or of the remainders over: the amount was paid into the Court of Exchequer.

Lord C. B. Alexander, after adverting to the unusual manner in which the estate in remainder of the children had been converted into an estate in possession, refused to allow them maintenance out of the fund, partly upon the ground that unborn children might become interested, but especially because there was a remainder over to persons who had not consented to the application. This decision recognises the rule now in discussion, though it may be doubted whether the rule was properly applied.

In the case of *Turner v. Turner* (z), an increase of maintenance beyond a sum given for that purpose by the will, was refused to a grandson between the age of twenty-one, and the age of twenty-five when the legacy was payable; the fund being left to grandchildren in unequal shares, with survivorship, and with a gift over in certain events to their children.

Where there was a devise of real estate (a) in trust for the infant grandson of the testator at twenty-one, with a direction to accumulate the rents for him in the mean time, and in case of the death of the devisee under twenty-one, the whole was given over to his sisters, also infants; Lord Loughborough allowed maintenance to the grandson. Where granted wrongly.

Sir W. Grant, M. R., has referred (b) to this as a case in which there was no consent, all being infants; but the fund was to go among them all.

Where annuities were given by will (c) to certain persons, the residue of the estate to be accumulated, and legacies of £200 a-piece, to be paid at twenty-one or marriage, without interest, to S. H., an infant, and to certain infant grand-

(z) 4 Sim. 430.

Ves. 25.

(a) *Greenwell v. Greenwell*, 5 Ves. 194.

(c) *Collis v. Blackburn*, 9 Ves. 470.

(b) *Berrington v. Chapman*, 12

children; and after the death of the annuitants, and the payment of the legacies, the residuary fund with its accumulations was to be equally divided among S. H. and each of the grandchildren who should be then living:—Sir W. Grant, M. R., decreed maintenance for the grandchildren. Here it is evident that the grandchildren were not the only persons entitled, and that the interests of S. H. were prejudiced: and Lord Eldon has disapproved of the decision (*d*).

A man made a general bequest to trustees (*e*), and directed them to pay to his wife, for the education of his children, £30 per annum, and to pay a portion of £1000 to his daughter at twenty-one, and (after certain other payments) to convey the residue to his sons, equally, as tenants in common, with survivorship [it may be presumed, between the sons in case of death under twenty-one without issue, &c.], a bill was filed, and a petition presented on behalf of the daughter and the sons, and the trustees offering no opposition, the petitioners were declared entitled to further maintenance, as well for the time past, since the death of the father, as to come, and a reference was directed.

So far as the sons were concerned, the increase of maintenance seems to have been rightly granted; for each had a vested interest in the residue, with a contingent gift over to the other, and each received compensation, in the present maintenance allowed to himself, for the diminution of the fund which might possibly belong to him on his brother's death; and as they were residuary legatees, the interest was properly applicable to their maintenance from their father's death.

But it is difficult to understand why any further maintenance was allowed to the daughter. She had simply a legacy, not yet vested, which would go over to her brothers, as residuary legatees, if she died under twenty-one, and she had nothing to give up to them in return for the increased

(*d*) See 3 Ves. 12, n.; 10 Ves. 47, n.

(*e*) *Aynsworth v. Pratchett*, 13 Ves. 321.

maintenance which she received out of their estate. Her case was that of a child to whom a father has given a contingent legacy, with an allowance for maintenance; a case in which it is settled (*g*) that no further maintenance can be allowed (*h*).

A testator (*i*) bequeathed a sum of money to be paid with accumulated interest to his daughter's children at twenty-one, as she should appoint; he also gave legacies of unequal amount to several children of his daughter, to be paid at twenty-one or marriage, without interest. Both gifts were to sink into the residue, in default of appointment by his daughter, or on the death of the children respectively under twenty-one. He directed his residuary estate to be accumulated and paid to his eldest grandson at twenty-one, with remainders over among the grandchildren, and in case of the death of all of them under twenty-one, a general gift over to his daughter.

Where granted
rightly by con-
sent.

(*g*) See p. 238, *infra*.

(*h*) The case of *Josselyn v. Josselyn*, 9 Sim. 63, seems also, at first sight, to be at variance with the authorities; but upon reference to Reg. Lib. 1829, A, fo. 647, it appears that the facts of that case were as follows: James Josselyn made a devise of real estate to Mark Josselyn and his heirs; with a gift over, in a certain event, to the infant John Josselyn and his heirs; with a gift over, in case he should die under twenty-one, and without leaving issue of his body then living, or which should be living until his, her, or their age or ages of twenty-one. The testator also bequeathed to the infant the residue of his personal estate, with a direction for accumulation

till the infant should attain twenty-four, and for the payment of £60 a-year for his board and education up to that age; and with a gift over in the same event in which the real estate was given over from the infant.

The gift over of the real estate to the infant took effect, and the sum of £60 having been reported insufficient for his maintenance, it was ordered, (Nov. 4, 1826), that the allowance should be increased to 150 guineas, and that the whole should be paid out of the rents and profits of the real estate; and this payment was by a subsequent order, (Feb. 19, 1830), raised to the annual sum of £300.

(*i*) *Cavendish v. Mercer*, 5 Ves. 195, note.

Lord Bathurst granted maintenance out of the interest of the legacies, the mother, to whom the property was given over, having consented (*k*).

Lord Eldon has spoken of this (*l*) as a case in which the children had, as among themselves, an equal chance to take the capital with the accumulation; and has remarked, that it is an authority only, that where the Court sees that it is for the benefit of the infant, the chance of surviving being equal, and can procure the consent of all persons interested, the Court will take the chance of controverting the direction for accumulation contained in the will.

II. Not allowed, where gift over to issue.

But the principle cannot be applied where, in case of the death of a child under twenty-one, there is a limitation to the issue, who for that purpose are as strangers; or where the will contains successive limitations under which persons not in being may become entitled. In such cases it is not sufficient that all the parties then living, presumptively entitled, are before the Court; for none of the living may be the parties eventually entitled to the enjoyment of the property (*m*).

Where granted wrongly.

A residuary bequest was made in favour of the infant grandchildren of the testatrix, payable at twenty-one or marriage, or to the issue of those dead, with survivorship, and accumulation till the time of payment, and a limitation over absolutely in case of the death of all without issue before that time. Lord Thurlow directed maintenance, taking the consent of the persons to whom the property was given over (*n*).

Lord Eldon has observed (*o*), that he could not think this case properly decided; for in the event of the death of a child under twenty-one, leaving issue, both the principal and

(*k*) No objection seems to have been made to the relinquishment of this contingent interest by the mother, a feme covert.

(*l*) 14 Ves. 202.

(*m*) 11 Ves. 606; 14 Ves. 204; 2 Swanst. 436.

(*n*) *Fendall v. Nash*, 5 Ves. 197, n.

(*o*) 14 Ves. 203.

the interest would have gone to that issue, who not only did not, but could not, consent; not being then in existence.

A man gave to his grandchildren £500 a-piece (*p*), to be paid at twenty-one, and the residue of his personal estate to the eldest, to be paid at the same age; the income to be accumulated, and to be paid with the capital of the legacies: with survivorship among the infants, and the issue of such as should die under age to stand in the parents' place. Maintenance was allowed by Sir W. Grant, M. R., out of the interest of the legacies of £500, and of the residue. Lord Eldon has observed (*q*), that this case is not within the former cases, as all the children might die under twenty-one, and none of them might take.

The decisions do not seem uniform in the case where the class of persons beneficially interested is not wholly before the Court, as where children unborn may form part of the same class.

In a case (*r*) where the children were not all the persons among whom the fund was to go, Lord Rosslyn directed maintenance; but upon an application for an increase of the allowance, Lord Eldon refused to increase or even to continue it, as those children might be the persons to take the whole, but future children, then unborn, might be the persons to take a part of it.

Where no gift over, but the class is not wholly before the Court, children unborn part of same class.

Refused.

A legacy was given (*s*) to the children of the testator's daughter when the youngest should attain the age of twenty-one. Lord Eldon refused maintenance out of the legacy, (the mother being alive); because if all died under twenty-one, and a child not yet in existence should come into existence, and attain that age, that child would take the whole, interest as well as principal.

(*p*) *Fairman v. Green*, 10 Ves. 44.

(*r*) *Sir Frederick Eden's case*, cited 11 Ves. 48, 604.

(*q*) 11 Ves. 606.

(*s*) *Lomas v. Lomas*, 11 Ves. 48.

In the case of *Turner v. Turner* (t), Sir L. Shadwell, V.C. cited with approbation Lord Eldon's statement of *Sir F. Eden's case*.

In *Ex parte Whitehead* (u), where maintenance was refused, Lord Chief Baron Alexander laid considerable stress on the fact that children unborn might become interested; though this was not the principal ground of his decision.

Allowed.

A testator directed (x) that the dividends on certain sums of stock should accumulate until one of the children of his daughter, then born or thereafter to be born, should attain twenty-one, and that the whole should then be transferred in equal parts to the children then living; and he subjected his residuary estate to the same trusts. Upon an application for maintenance, Sir John Leach, V.C., stated the principle to be, that wherever the children have a common interest in a fund, the income of the fund, if necessary, may be applied to their maintenance; and said, that in the case before him, children born or to be born had a common interest, and therefore the income of the fund was applicable to maintenance.

Maintenance was prayed (y) out of the interest of a legacy charged upon real estate, upon trust for the younger children of the testator's daughter, to accumulate during their minority, and payable equally among them at their ages of twenty-one. Lord Eldon, after stating that maintenance could not be allowed where the interest of the fund might possibly belong to other persons than the infants, observed that in the case before him future children coming into existence might take shares; but that it was not stated to whom the property was to go, if all the children should die under the age of twenty-one; and he directed that the petition should stand over until he could see the will. No order appears to have been

(t) 4 Sim. 435.

275.

(u) 2 Yc. & C. 243; *supra*, p. 226.

(y) *Errat v. Barlow*, 14 Ves.

(x) *Haley v. Bannister*, 4 Mad. 202.

made by Lord Eldon, but the Master of the Rolls afterwards ordered maintenance for the infants upon an *ex parte* application (x).

The weight of authority seems adverse to the allowance of maintenance in such a case.

A fund was given by will (a) in trust for the children of E. G. equally; the shares of the sons to vest at twenty-four, or death under that age, leaving issue; of the daughters at twenty-four or marriage; with a proviso for accruer of unvested shares, but without any gift over. Maintenance was applied for, the interests of all the children being still contingent. The Vice-Chancellor remarked that the chances of obtaining a vested interest in the fund appeared not to be equal as amongst the children themselves; and that, at all events, he could not make the order without the consent of the testator's next of kin.

Refused on account of next of kin, the class not having the fund absolutely.

It does not appear that in any of the other cases on this subject any stress was laid on interests not created by the instrument itself. There was no gift here to any possible issue of the sons;—but the fund was not so given that the children must absolutely take it among them; and there was another interest, that of the next of kin, which would take effect in the contingency of their all dying without taking a vested interest (b).



SECTION IV.

Maintenance out of Legacy from Parent to Child.

ALTHOUGH it is a general rule that legacies, for the payment of which no time is named, bear interest from the end

(x) See 4 Mad. 279, 280. 523.

(a) *Cannings v. Flower*, 7 Sim. (b) See p. 225, *supra*.

- Always allowed from the death, of a year after the death of the testator, and legacies made payable at a future day bear interest from such time of payment (c); yet in the case of a bequest from a parent to a child, where the child has no other provision, the Court will do what the parent, if living, ought to have done; and, presuming his intention to correspond with his duty, will allow interest on the fund, by way of maintenance, from the death of the parent; and this whether the legacy is vested or contingent, whether immediate or payable at a future day, or even if there be a devise over, in case of the death of the legatee before the day of payment (d).
- on presumed intention.
- Notwithstanding direction for accumulation. So where a man gave the residue of his estate to his infant child, upon his attaining the age of twenty-one, and the interest to accumulate, saying nothing as to maintenance; and if he died before, gave it over; it was referred to the Master to consider of a proper allowance for the maintenance and education of the infant, from the death of his father, to be paid out of the produce of his estate (e). There is an old case to the contrary (g), but the doctrine is now settled.
- So from persons in loco parentis. The rule extends to bequests accompanied by directions as to the maintenance and education of the legatees, or by the appointment of guardians for them, or generally by any circumstance indicating an intention on the part of the testator to put himself in loco parentis. In the case of *Acherley v. Vernon* (h), Lord Macclesfield conceived this intention to be established, and he decreed accordingly. Where a grandfather having taken the children of a son who had ruined

(c) See 1 Swanst. 561, n. 3 Atk. 430; *Long v. Long*, 3 Ves.

(d) See Ward on Legacies, 306; 286, n.; *Brown v. Temperley*, 3 1 Atk. 507; 3 Atk. 102; 1 Cox, Russ. 263.

243, 434; 3 Ves. 16; *Glide v. Wright*, (e) *Mole v. Mole*, Dick. 310; 1 Ch. Rep. 285; *Greenhill v. Wal-* and see *Mills v. Roberts*, 1 R. & doe, Gilb. Eq. R. 31; Prec. Ch. 367; M. 555.

Att.-Gen. v. Thompson, Ibid. 337; (g) *Leach v. Leach*, 1 Ch. Ca. 249.

1 Eq. Ab. 301; *Harvey v. Harvey*, (h) 1 P. W. 783; see 3 Atk. 2 P. W. 21; *Incedom v. Northcote*, 103, 3 Ves. 16, 1 Sch. & Lef. 5.

himself, educated them entirely; and by his will gave the son a provision, by way of annuity, provided he did not interfere with the children, and then gave legacies to the children: Lord Bathurst thought this sufficient to raise the implication, and *interest* was decreed (*i*). A man had given a bond and made payments to the parish for the support of a natural child of his deceased son. Interest was allowed from his death, on a legacy given by him to the child (*k*). In a case before Lord Rosslyn, where a testator gave legacies to the natural children of his son, payable at a future day, he gave no maintenance in the mean time; but by his will directed that his trustees should be guardians to the children, (which he had no power to do), and gave directions how they should be educated; the children had no other provision, and it was considered as a necessary implication from the whole will, that he intended to give interest (*l*). So where legacies were given to infants, cousins of the testatrix, payable at twenty-one, with benefit of survivorship in case of death under that age, with power to the executors to apply any part of the legacies towards the maintenance or education of the children (*m*).

So where a testator directed his trustees to apply a legacy of £4000 to the uses of his natural son, and his maintenance and education to be paid out of the interest of that sum (*n*). So where legacies, to be vested at twenty-one, or on dying under that age leaving issue, were given to the children of a deceased son of the testator, (some of them illegitimate), with benefit of survivorship; with power for trustees, at discretion, to apply the interest in the maintenance and education of the children, or for their advancement, or to accumulate it for their benefit (*o*).

(*i*) See 1 Sch. & Lef. 5.

561, n.

(*k*) *Rogers v. Soutten*, 1 C. P. Cooper, 96.

(*n*) *Beckford v. Tobin*, 1 Ves. 308; see *De Mazar v. Pybus*, 4 Ves.

(*l*) See 1 Sch. & Lef. 6.

644.

(*m*) *Pett v. Fellows*, 1 Swanst.

(*o*) *Hill v. Hill*, 3 V. & B. 183.

So where a legacy (*p*) was given to a natural child with a direction to apply the interest for his maintenance during his minority, interest was given from the death of the testator.

So where a man (*q*) had devised his property to the father of certain minors, who was alive when he commenced writing his will, but who died before he had completed it, and the testator reciting that fact, said, "he felt it incumbent on him to secure for the use and support of the children, a certain portion of the property he bequeathed to their late father," and charged a certain sum on his estates for their use and support, payable at twenty-one or marriage.

So where a testator gave legacies to his natural children at twenty-one with benefit of survivorship, and a gift over in case of their dying under that age, and also named trustees and guardians to the children, and requested them to attend to their education (*r*).

Not from grand-father simply as such.

The rule is founded on the natural obligation of parents to provide for their issue; or on the assumption of this duty by persons other than parents, and unless the intention of the testator to place himself *in loco parentis* can be inferred, interest will not be allowed by way of maintenance, on bequests (not being such as to carry interest by the general rules of law) to grandchildren, where the parents or either of them are living (*s*); and it has been stated in general terms, that grandchildren are not within the rule. But as a grand-father is bound by law to support his grandchildren if their parents are dead, it may be doubted whether a legacy to a grandchild under such circumstances is not within the rea-

Where grand-father liable to maintain, *query*.

(*p*) *Dowling v. Tyrrell*, 2 R. & My. 343; see *Newman v. Bateson*, 3 Swan. 689. (*s*) *Haughton v. Harrison*, 2 Atk. 329; *Butler v. Freeman*, 3 Atk. 58; *Elton v. Elton*, Ibid. 507;

(*q*) *Leslie v. Leslie*, Ca. temp. Sug. 1. *Coleman v. Seymour*, 1 Ves. 209; *Ellis v. Ellis*, 1 Sch. & Lef. 1;

(*r*) *Mills v. Roberts*, 1 R. & My. 555. *Descrambes v. Tomkins*, 1 Cox, 133.

son of the rule, and whether it ought not to carry interest from the death of the testator. There does not appear (t) to be any express decision to the contrary. In the case of *Elton v. Elton*, Lord Hardwicke is made to say that a grandfather is not bound by natural duty to provide for a grandchild, "especially in this case, where a father was living at the time of the will, and after the death of the testator." In the case of *Crickett v. Dolby* (u), Lord Alvanley said that a grandchild is always in the same case as a child; on another occasion he remarked (x), "a grandfather in this Court is not supposed under an obligation to provide for his grandchildren after the death of his daughter. I cannot say I quite agree to that doctrine, but I will not set up my own opinion upon it." And in *Tyrrell v. Tyrrell* (y), he stated the case of "an infant having a right to demand maintenance from the testator," as an exception to the general rule, that maintenance can be demanded only from the time when the legacy is payable (z). Lord Eldon said in a subsequent case, "where a legacy is given to a grandchild, without more, would that grandchild take interest as a child would? In the case of a grandchild must there not be something more than merely giving a legacy, something shewing that the testator put himself *in loco parentis*?" "The case of a grandchild where the father is alive and abundantly providing for it, is very different from the case where the father is dead. As to the statute of Elizabeth, if the father is living, the grandfather is under no legal obligation."

Now, where there is an orphan grandchild unprovided for and depending upon the grandfather for support, both by natural right and by the statute; it is submitted that a be-

(t) In the Report of *Palmer v. Mason*, 1 Atk. 504, it is not stated that the parents were dead.

(u) 3 Ves. 12.

(x) 5 Ves. 443.

(y) 4 Ves. 5.

(z) *Perry v. Whitehead*, 6 Ves. 546.

quest by the grandfather to such a grandchild may, without impropriety, be considered as indicating the assumption, or rather the acknowledgment of parental duty.

Not from uncle,
as such.

Where the testator has not put himself *in loco parentis*, the rule does not extend to a bequest to a nephew or niece (a); nor to bequests to natural children, who are not considered as relatives, nor favoured in law (b). There is a dictum of Lord Alvanley in *Crickett v. Dolby*, in favour of a natural child; but Lord Eldon thought (c) there must be something to shew that the testator put himself *in loco parentis*; and it has since been decided (d) that a natural child is not, merely as such, within the rule.

Nor father of
natural child.

Interest not
given except for
maintenance.

But though interest is thus given by way of maintenance, the infant has no claim to any interest beyond what the Court thinks sufficient for his maintenance.



SECTION V.

Limited Gift of Maintenance out of Fund not carrying Interest.

Sum fixed for
maintenance on
fund not carry-
ing interest.
Not increased
by Court,

—unless the
principle of
compensation
applies.

WHERE a legacy is given, which would not, abstracted from the rule in favour of children, carry interest, and an annual sum less than the interest is given for maintenance, the child shall have no more, however small the maintenance may be, and however large the legacy; for the giving an express sum for maintenance bars the presumption, that an indefinite maintenance was intended (e). Where, however, the case is such that maintenance would be allowed upon

(a) *Crickett v. Dolby*, 3 Ves. 30.

(b) 1 Ves. 310.

(c) *Perry v. Whitehead*, 6 Ves.
547.

(d) *Lowndes v. Lowndes*, 15 Ves.

301.

(e) 2 P. W. 22; 3 Ves. 17; 1
Sch. & Lef.; 3 Ves 17.

the principle of compensation, mentioned above (*g*), even if the giver of the fund had not been a father, or person *in loco parentis*, maintenance will still be given, and even allowance made, if necessary, for advancement; not upon the presumed intention of the donor, but upon the principle of compensation (*h*).

Where a mother bequeathed out of her general personal estate an annuity for the maintenance of her daughter during infancy, and also gave her a legacy to be paid at twenty-one, with a gift over in case of her death under age, Lord Hardwicke was of opinion that the daughter could have no more interest during her minority than the sum given for maintenance (*i*). So where a father gave legacies to his daughters, payable at twenty-one or marriage, and directed maintenance in the mean time out of his general personal estate (*k*). Where portions were provided, under a settlement, for younger children, with an express maintenance of two per cent. upon the portions; the father by will increased the portions, and the Lord Chancellor continued the two per cent. on the increased capital (*l*). An older case, indeed, seems to favour the allowance of interest on such a legacy, notwithstanding an express bequest for maintenance (*m*); but Lord Hardwicke has disapproved (*n*) of this case, which was decided on peculiar circumstances, and the contrary doctrine is now established.

Where there is an express direction that maintenance shall cease, and accumulation commence, at a certain time, or on the happening of a certain event, this bars the presumption

Time of maintenance limited;—will not be extended.

(*g*) *Supra*, p. 225.

(*k*) *Wynch v. Wynch*, 1 Cox,

(*h*) *Evans v. Massey*, 1 Yo. & 438.

J. 196; but *query* whether advancement falls properly within the rule, see *infra*.

(*l*) *Long v. Long*, 3 Vea. 285, n.

(*m*) *Bourne v. Tynne*, 2 Vent.

346; cited 1 P. W. 786.

(*i*) *Hearle v. Greenbank*, 3 Atk. 716; 3 Vea. 287.

(*n*) 3 Atk. 102.

upon which, in a father's case, the rule is founded, that maintenance is intended for the infant during minority. (o)

Unless intention can be inferred.

A testator gave a residuary fund to trustees, and directed them to pay the interest to his wife, for the maintenance of herself and children, until the death of her father, when the payments were to cease, and the interest was to accumulate for the children, until the youngest should attain twenty-one; the testator having understood from the wife's father that he had by his will made ample provision for her and the children after his decease;—the fund and the accumulations to be transferred to the children on the youngest attaining twenty-one, with benefit of survivorship on death under that age; the issue of those who should so die to take the parent's share; with a bequest over in case all should die under twenty-one without issue.

The testator died in the lifetime of the wife's father, and the latter died without having made any provision for the infants. The Court refused to allow maintenance out of the residuary fund, though the parties to whom it was given over consented; because the accumulated fund might eventually belong to some unborn issue of the children.

But the period of maintenance will be prolonged if such an intention can be inferred.

A testator directed maintenance (p) for his sons during minority, and for his daughter till twenty-one or marriage, and gave her a legacy in case she should attain twenty-one, to carry interest from that time, and payable by instalments, the first at twenty-one. The daughter married at the age of eighteen. Lord Eldon allowed maintenance from the day of her marriage till twenty-one; observing that the testator having expressly provided for the maintenance up to a certain period, leaving a chasm unprovided for, and having

(o) *Kime v. Welbit*, 3 Sim. 533.

(p) *Chambers v. Goldwin*, 11 Ves. 1.

given interest, as interest, from the period of majority to the time when the legacy was to be paid, the Court (by analogy to the case of a legacy to a child, payable at a future day, without any direction as to interest) might infer that he did not mean that this child should have nothing in that interval.

A testator gave a residuary fund (*q*) to be accumulated, and to be divided at a certain period among his grandchildren who should attain twenty-one; with survivorship in case of the death of any after a certain period, and under twenty-one; and with a direction for the maintenance and advancement, (in certain events), of the grandchildren during minority. A grandchild who had enjoyed an allowance for maintenance, attained twenty-one before the time of distribution had arrived. The allowance was continued by the Court.

SECTION VI.

Cases in which Maintenance will be allowed or increased.

WHERE a present absolute interest in a fund is given, the Court will allow maintenance in the absence of any direction to that effect, and even in disregard of a direction for accumulation; and if an insufficient sum is given for maintenance, the Court will increase it. It will, in like manner, grant an increase of an insufficient maintenance given by will, wherever maintenance is allowable upon the principle of compensation mentioned above (*r*), for that principle is wholly unconnected with any supposed intention of the donor.

Where present absolute interest, maintenance allowed, whether directed or not,

A father gave legacies absolutely to his infant daughter, and directed the interest on each to be accumulated during

—and limited maintenance increased.

(*q*) *McDermott v. Kealy*, 3 Russ. 24, n. (r) *Supra*, p. 225.

minority, except a small sum for maintenance. Sir T. Plumer, V. C., said, that the legacies being vested, the Court would allow what was necessary for maintenance (s).

Principle of compensation applies.

The case of *Dynsworth v. Pratchett* (t), though questionable as an application of the rule of compensation, is an authority on this head.

Allowed notwithstanding gift over, where probably intended.

Maintenance will be allowed out of the interest of a legacy where there is a fair inference from the whole of the will, that the testator intended to give it.

A man gave his daughter (u), for her life only, an annuity for and towards the maintenance of herself and the education and maintenance of her children; and upon and after her decease he gave a sum of money to her children, when and as they should respectively attain twenty-one, with benefit of survivorship; and if none should attain twenty-one, the legacy to cease, and sink into his personal estate. The mother died, and the Master of the Rolls allowed maintenance, thinking it extremely improbable that the testator intended the children to be without any provision, in case the mother died leaving them under age.

SECTION VII.

Of Maintenance, considered as an Interest in the Infant.

Two allowances given; both valid, though only part expended.

WHERE a testator gave maintenance to one of his sons out of his real estate, and also gave him maintenance out of his personal estate, and likewise gave him real estate and a money legacy, but devoted the rents and the interest to other purposes during his infancy; the son was held, as between

(s) *Stretch v. Watkins*, 1 Mad. 263; *Evans v. Massey*, 1 Yo. & J. 198.

(t) *Supra*, p. 228.

(u) *Lambert v. Parker*, Coop. 143.

himself and the testator's estate, to be entitled to two allowances for maintenance, although the Court exercised its own discretion in determining the amount to be actually expended, and ordered that the rest should accumulate for his use (x).

If there are two funds absolutely given by different persons for the maintenance of an infant, the interest of the infant must determine which of the two is to be applied (y). Which to be applied.

Where a father gives a legacy to his child, payable at a future period; if maintenance is given generally to the child, so that the whole may be exhausted by the maintenance, that shews the testator meant it to carry interest (z).

Interest given to an infant by a testator, by way of maintenance, upon a contingent legacy, belongs to the infant, though his father is obliged to maintain him; and if he dies, it will go to his administrator (a). Maintenance on contingent legacy goes to administrator of infant;

Where lands were devised, in trust, within six years after the testator's decease, to raise and pay £1500 a-piece to his two daughters, and also out of the rents and profits to pay interest at the rate of four per cent. upon the legacies, until the same should be paid, for and towards their maintenance and education; and one of the daughters married, and died within the six years; it was held, that her husband and administrator, though entitled to the principal, could not recover interest from her death, that being designed for her maintenance (b). —but not payable for period after infant's death.

In provisions for maintenance of children, there has always been apportionment as between the tenant for life and those in remainder, of an annuity or dividends. Where, by a marriage settlement, maintenance for daughters was made payable half-yearly, at Lady-day and Michaelmas, until Apportionment of maintenance.

- (x) *Oliver v. Walsh*, 1 Bro. C.C. 146. (z) *Crickett v. Dolley*, 3 Ves. 17.
 (a) *Harris v. Finch*, 1 M'Clel. 141.
 (y) *Foljambe v. Willoughby*, 2 S. & S. 165. (b) *Cooper v. Scott*, 3 P. W. 119.

the portions became payable, which was at eighteen or marriage: a daughter attained the age of eighteen on the 16th of August; it was decreed that she should have her maintenance *pro rata* from the last Lady-day to the time of her attaining eighteen (c).

Power to charge with "reasonable portions" for maintenance, is capable of execution.

Sir Anthony Hart held, in an Irish case (d), that a power to charge estates "with reasonable portions or fortune for younger children, and for their maintenance and education," was sufficiently certain to be capable of execution. In pursuance of such a power, a father appointed a portion for an infant, payable with interest from his own death. The infant died under age. The portion was not considered to have vested, so as to be transmissible to her administrator (who was her mother); but the mother was held to be entitled, under the head of general relief, to an allowance for the maintenance of the infant during the period she survived her father, though it was not prayed by the bill.

Heir at law not otherwise provided for, having only a particular estate, entitled to maintenance.

A person having a particular estate, being an heir at law, not otherwise provided for, is, as against the remainderman, entitled to maintenance; and it seems that this rule applies, even though it cannot be raised without charging the inheritance. Where, however, a tenant for life (e), who was heir at law, but had other property, paid off debts affecting the inheritance, his widow and personal representative was not admitted as a creditor of the estate in respect of any interest paid by him on the debts—it being the duty of the tenant for life to keep it down—nor was she considered to have any claim upon the favour of the Court, from the circumstance, that no maintenance had been raised during her husband's infancy.

(c) *Hay v. Palmer*, 2 P. W. 501; (d) *Edgeworth v. Edgeworth*, 1 see *Reynish v. Martin*, 3 Atk. 330; Beat. 328.

Ward on Legacies, 305.

(e) *Burges v. Mawbey*, Turn. & Russ. 174.

SECTION VIII.

Gift to Parent for Maintenance.

It has been already stated (*g*), that where a fund is expressly given to a father for the maintenance of his child, this amounts to a legacy to the father.

Gift to parent
for maintain-
ance.

Where a legacy was given to a father, the better to enable him to provide for his younger children, with a gift over, in a certain event, to his wife for the same purpose, he consented to secure the capital, and was held entitled to the interest (*h*).

So, where it is given to a mother (*i*), or even, it seems, to a guardian (*j*), for the same purpose. In a case, where trustees were directed to pay the interest of a certain fund to the testator's niece, for the maintenance of her children, it was held, upon the construction of the will, that the money was payable, although she had no children (*k*).

But although where a gift is thus made to a person, and a trust created in that person, the Court may safely and properly pay over the fund to the individual who is such trustee; yet the person to whom the payment is so made in that character, shall be accountable for the fund to those for whose benefit the trust is created (*l*). Such a trustee is not at liberty to assign the fund to his creditors, or to any other person, without regard to the interests of the child (*m*).

(*g*) *Supra*, p. 218; *Andrews v. Partington*, 2 Cox, 223; *Robinson* Swanst. 35.

v. Tickell, 8 Ves. 142.

(*k*) *Hammond v. Neame*, 1 Swanst. 35.

(*l*) *Woods v. Woods*, 1 M. & C.

(*h*) *Brown v. Casamajor*, 4 Ves. 409.
498.

(*m*) *Wetherell v. Wilson*, 1 Keen,

(*i*) *Thurston v. Essington*, Jac. 80. See *Hadow v. Hadow*, 9 Sim. 361, n.; *Hamley v. Gilbert*, Jac. 354. 438; *Jubber v. Jubber*, Ibid. 503.

(*j*) *Berkeley v. Swinburne*, 6 Sim. 613.

Perhaps gifts of this kind are to be considered less as trusts, than as gifts subject to a condition, which do not carry with them any liability to account unless there is some failure in performance of the condition.

In one case, however, Lord Gifford, M. R., set apart a fund for the infant's education, although there was a direction that the mother, to whom the gift was made, should not be liable to account (*n*).

A testator gave his wife (*o*) £400 a-year in addition to her jointure, in consideration of the expense and care she would incur in the maintenance of their children. It was held, that she must maintain them when at home, but that she was not to be charged with their education or maintenance at school.

SECTION IX.

Maintenance for Time past.

Not allowed to father, except on special case. History of the doctrine.

As it is the duty of a father to maintain his child, Lord Thurlow held (*p*), that a parent ought not to be allowed to determine for himself the question of his ability; and he laid it down as a rule, that even in those cases where the Court thought proper to allow maintenance, it would never make a father any allowance with retrospect to what he had paid without the authority of the Court.

In the case of *Reeves v. Brymer* (*q*), Lord Eldon observed, that the old practice was, that if the father had by any means maintained his children, the Court would not reimburse

(*n*) *Hamley v. Gilbert*, Jac. 354; C. 387; *Hill v. Chapman*, 2 Bro. see *Allen v. Coster*, 1 Beav. 202; C. C. 231; *Andrews v. Partington*, *Hillier v. Hillier*, Freem. 110. 3 Bro. C. C. 60; S. C. 2 Cox, 223.

(*o*) *Collier v. Collier*, 3 Ves. 33. (*q*) 6 Ves. 124.

(*p*) *Hughes v. Hughes*, 1 Bro. C.

him; but being informed that the practice had been altered in the time of Lord Rosslyn, he expressed his approbation of the practice as altered, and he ordered maintenance to be paid to a father for money laid out before the Report. Similar orders were made in several other cases (r).

In the case of *Maberly v. Turton*, Lord Eldon said, there was no doubt that, since the time of Lord Thurlow, the rule had been altered; and that now, as the precedents stand, the Court must look at each case with the view to make such order as the rule prescribed by the testator justifies, and the conduct of the parties allows.

In a case in Ireland before Lord Mannors (s), a father, being unable to maintain his infant children, contracted debts for their maintenance; to which debts he was still liable, when a fund was paid into Court on behalf of the infants. An order was made that he should be reimbursed out of the income arising from the fund.

Sir John Leach, M. R., however, refused (t) to make a reference for maintenance for time past, where the father alleged inability; and

In a late case (u), Sir C. C. Pepys, M. R., said, he had on several occasions made inquiry as to the practice, and found that it was contrary to that stated to have been introduced by Lord Rosslyn. To allow for past maintenance, and to treat as a debt the expenditure which the law imposed upon the father as a duty, would be to act against the settled rule of the Court. The Court might, if a special case were made, direct an inquiry; but in the case before him, the inquiry as to past maintenance was asked for as a matter of course, and must, consequently, be refused.

(r) *Ex parte Penleaze*, 1 Bro. C. C. 387, n.; *Sherwood v. Smith*, 6 Ves. 464; see *Sisson v. Shaw*, 9 Ves. 288; *Maberly v. Turton*, 14 Ves. 499. (s) *Ex parte Darlington*, 1 Ba. & Be. 240. (t) *Simon v. Barber*, Taml. 22. (u) *Ex parte Bond*, 2 M. & K. 439.

Allowed, if
maintenance
due of right.

Where maintenance is due of right to the father, it is given as well for time past as for the future (*x*); and so, where a mother or guardian has made advances for maintenance, the advances, if proper and not extravagant, will be repaid (*y*). But if a mother thinks fit to support her child, she cannot charge the child with any maintenance, except out of the interest of its fortune (*z*).

If a guardian thinks proper to allow to the infant more than the maintenance settled by the Court, the Court will make a reference as to such extra expenditure, but only under special circumstances (*a*).

Where a legacy is left to children, in whose maintenance considerable expense has been incurred before the death of the testator, by a person who would be entitled to repayment, if the property had belonged to the children from the first; such expense can form no debt upon the legacy, and no order can be made for raising it (*b*).

How, where
money has
been advanced
by stranger.

A man took charge (*c*) of his wife's daughter by a former marriage, who was without a testamentary guardian, and he received a certain annual sum from the persons who were in possession of the infant's property; he learnt, after the marriage of the infant, that a larger sum than that which he had received was properly applicable to her maintenance and education, and having instituted a suit, he obtained a reference to the Master to ascertain what had been expended in the maintenance and education of the infant beyond the sum which he had received.

(*x*) *Meacher v. Young*, 2 M. & K. 490.

(*y*) *Heysham v. Heysham*, 1 Cox, 179; *Re Swift*, 1 R. and My. 575.

As to the method of computing maintenance for time past in the days of Lord Hardwicke, see *Moor v. Lacy*, Appendix III.

(*z*) *Beasley v. Magrath*, 2 Sch. and Lef. 35.

(*a*) *Rainsford v. Freeman*, 1 Cox, 417.

(*b*) *Re England*, 1 R. and My. 499.

(*c*) *Stopford v. Lord Canterbury and Others*, V. C. July 2, 1840.

A father died indebted to his children; Lord Talbot, in a creditor suit, decreed that an account of his debts should be taken, and that the Master should inquire what was reasonable to be allowed to the father for the maintenance of his children, *from the time they respectively attained twenty-one* till the time of his death, and should deduct the same out of what should be found due to them. The decree was affirmed by the House of Lords, with a variation not affecting this point (d). Maintenance cannot be set off against debt to infant child;

An allowance for past maintenance cannot be deducted from a legacy left by a father to his child (e). —nor deducted from legacy to child.

In the case of *Williamson v. Codrington* (g), Lord Hardwicke observed, that where a father had made a voluntary settlement on his child, and maintained that child, it would be very difficult to say that child should have an account back of the profits, which could not be done without deducting that maintenance.

A father charged his real estate (h) with a certain sum, as a portion for a younger child, with interest. The child died before the age at which the portion was payable, and Lord Hardwicke decided that the portion should sink, for the benefit of the heir; but that the gift of interest was the same thing as a gift of maintenance; and that whoever had maintained the child, would be entitled to it.

A younger brother (i) having a provision under a settlement, lived for some years with the elder, who was entitled to the estate charged with the portion. The younger died before the portion was raised, and when it came to be raised, the elder had an allowance for the maintenance of the younger.

(d) *Bank of England v. Morice*, 2 Bro. P. C. 485, ed. Toml. It is erroneously stated, (3 Atk. 124), that this part of the decree was reversed.

(e) *Jeffreys v. Jeffreys*, 3 Atk. 123.

(g) 1 Ves. 517.

(h) *Boycot v. Cotton*, 1 Atk. 552; and see *Bruen v. Bruen*, Prec. in Chanc. 195; 2 Vern. 439, S. C.

(i) *Boycot v. Cotton*.

SECTION X.

Large Allowance for the Benefit of Infant's Family.

Liberal allow-
ance,

A LIBERAL allowance will be made for the maintenance of an infant, with a view to the circumstances of his family. If he is the eldest, and has considerable property, while the others have little or none (*k*), the Court will give them maintenance, or a part of maintenance, out of his provision, as a part of the maintenance made for him, though to be applied to them, looking upon him as the head of the family, and considering it to be for his benefit, not that this portion of his fortune should be saved, but that by means of it his brothers and sisters should be honourably brought up.

—to educate
brothers and
sisters,

A larger maintenance has been allowed, even with a view to the benefit of an illegitimate brother of the infant, born of the same parents (*l*).

—to relieve pa-
rents,

The narrow circumstances of a father, or of a mother, or of both, have also been considered, in fixing the infant's allowance for maintenance (*m*); and when a mother and testamentary guardian was insolvent, and on that account another guardian was appointed, the sum of £250 per annum was allowed for the maintenance and education of the infant, £130, part of that sum, were ordered to be actually paid to the guardian for maintenance and education, and the remainder to the mother (*n*).

(*k*) *Pierpoint v. Lord Cheney*, 1 P. W. 493; *Harvey v. Harvey*, 2 P. W. 22; *Lanoy v. Duke of Athol*, 2 Atk. 447; *Petre v. Petre*, 3 Atk. 160; *Hill v. Chapman*, 2 Bro. C. C. 511; *Ex parte Petre*, 7 Ves. 403; 231; *Allen v. Coster*, 1 Beav. 202. *Tweddell v. Tweddell*, Turn. & Russ. 13; see *Wellesley v. Duke of Beaufort*, 2 Russ. 28.

(*l*) *Bradshaw v. Bradshaw*, 1 J. & W. 647.

(*m*) *Roach v. Garvan*, 1 Ves. 160; *Allen v. Coster*, 1 Beav. 202.

(*n*) *Heysham v. Heysham*, 1 Cox, 179.

Even the misconduct of parents will not always exclude them from participation in the fortunes of their children (o). notwithstanding their misconduct.

A sum of stock was bequeathed to certain persons in trust to pay the dividends to a father, to be applied by him for the maintenance and education of his son and daughter, until the daughter should reach twenty-one, and then to pay certain annuities to the parents, and the rest to the children. The father was a common labourer and in great poverty; and in consequence of his and his wife's misconduct, the children were committed by the Court to other persons. The parents presented a petition, submitting that the dividends belonged to them during the minorities of the children, subject to the burden of maintenance and education. Lord Langdale, M. R., without saying anything as to the construction of the will, increased the maintenance of the children for the support of their parents, though the conduct of the latter had been of the worst kind; considering this to be evidently for the benefit of the infants themselves.

But where an eldest son had been conveyed to Douay clandestinely, out of the hands of the guardian, the Court, as he could not be brought before it, could make no order of this kind, but directed, after the widow's jointure was satisfied, that the surplus rents and profits should be laid out for his benefit (p). Refused where infant eloiigned.

Lord Thurlow refused to make it a special direction to the Master to consider the circumstances of the infant's family, or of any member of it; not choosing to control the Master's discretion (q). Lord Loughborough, in the case of *Hoste v. Pratt* (r), directed the Master, in considering of a proper allowance for maintenance, to have regard to the number of Whether special direction in reference to consider family circumstances, query.

(o) See *Allen v. Coster*, 1 Beav. 202, where, however, there was ground for contending that the father was beneficially interested in the funds. See p. 245, *supra*.

(p) *Petre v. Petre*, 3 Atk. 511.

(q) *Burnet v. Burnet*, 1 Bro. C. C. 179; S. C. 2 Dick. 602.

(r) 3 Ves. 733.

children of the infant's father. In *Mundy v. Earl Howe* (s), he thought there ought to be a direction to diminish the maintenance in respect of the great additional fortune the father had derived from the mother. But *Hosie v. Pratt* appears to have been hastily decided (t), and in *Mundy v. Earl Howe*, no direction of the kind alluded to appears in the Registrar's book (u). Mr. Belt informs us that Lord Eldon, though approving of a liberal allowance, has declined to prejudice the Master's decision, and to innovate upon the practice of the Court by any special directions (x).

Reference for illegitimate children of lunatic.

Upon a petition presented by the committee of a lunatic's estate, a reference to the Master has been granted to inquire what ought to be allowed for the maintenance of the illegitimate children of the lunatic (y); but the Lord Chancellor refused to extend this indulgence to their mother.

Infant having married ward of court without leave, reference for maintenance of both parties.

Where a marriage had been (z) improperly brought about between a ward of Court, and C. P., a male infant without fortune, it was referred to the Master, (the contempt having been disposed of), to see what was proper to be allowed for the maintenance of C. P. and his wife.

SECTION XI.

Where Principal will be broken.

Principal broken for maintenance and advancement, though not vested nor payable.

THE Court has not scrupled to break into the principal, even of a legacy not vested, where the legacy is so small that the interest will not suffice to give the infant legatee a competent maintenance and education, or where it will be clearly for his benefit that a sum of money should be raised

(s) 4 Bro. C. C. 227.

(s) Note to 1 Bro. C. C. 179.

(t) *Supra*, p. 220.

(y) *Re Jones*, 5 Russ. 154.

(u) 4 Bro. C. C. 227, n. (5), ed. Belt.

(z) *Edes v. Brereton*, West, 348.

for a certain purpose. Thus, where two infants had only some land yielding about £6 per annum, and a principal sum of £298 (a), maintenance was ordered out of the principal.

So, where the principal was about £60 stock (b).

It seems that if one, not a parent, gives a legacy to an infant, payable at twenty-one, without any devise over, and the infant has nothing else to subsist on, the Court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal; though this is done very sparingly (c).

Where children were entitled under their father's will to legacies of £150 and £100 respectively, payable at twenty-one, with interest in the meantime at four per cent. for maintenance, and also to a residuary bequest, amounting to £300 and £200 respectively, at twenty-one, with survivorship, (and therefore not vested), and the will gave full power to trustees to pay what they should think necessary out of each child's portion for his advancement in life; the Lord Chancellor, upon petition, made an order for the payment of certain sums out of the principal of the children's shares of the residue towards their maintenance, education, and advancement in the world (d).

Where children had been deserted by their father (e), and their mother was able and willing to maintain them, if they returned to her in India, but they had no means of defraying the expense of the voyage, the sum of £300 was ordered to be raised for that purpose out of their capital, to which they were absolutely entitled.

(a) *Ex parte Green*, 1 Jac. & W. 253.

(b) *Ex parte Swift*, 1 R. & My. 575.

(c) *Harvey v. Harvey*, 2 P. W. 23.

(d) *Ex parte Chambers*, 1 R. & My. 577; *supra*, p. 214.

(e) *Re England*, 1 R. & My. 499.

Whether principle of compensation applies to advancement.

The principle of compensation mentioned above has been acted on in the case of advancement as well as of maintenance. In the case of *Evans v. Massey* (*h*), a man gave a fund among his natural children, and directed that it should accumulate till they should respectively attain the age of twenty-one, and that there should be deducted annually from the interest such proportion as might be necessary for their education and other expenses; with benefit of survivorship in case of either dying under twenty-one, and a gift over in case of all dying under that age; each to be entitled to his share on attaining twenty-one.

The Master having reported, on a reference, that it would be for the benefit of one of the infants that a commission in the army should be purchased for him, and that a certain sum would be necessary for that purpose, Lord Chief Baron Alexander, after considerable hesitation, with the consent of the parties to whom the fund was given over, ordered the money to be advanced. It is not clear that this case is properly within the principle of compensation, for the other children might not require a similar advancement.

Where principal broken for past payments.

In such cases the Court has also sanctioned (*i*) past expenditure in maintaining the infant, and payment for an apprentice fee, and for charges of the infant's funeral, though the will only directed the infants to be maintained as far as the interest of their several legacies of £100 each would extend, and the legacies were payable at twenty-one, with a devise over in case of death under that age (*k*).

It was held, however, in a modern case, in the Court of Chancery in Ireland (*l*), that a principal sum bearing interest was not available for the maintenance of infants, though it had been produced by an accumulation of interest.

(*h*) 1 Yo. & J. 196; *supra*, p. 239. 137; see *Harvey v. Harvey*, 2 P.

(*i*) *Barlow v. Grant*, 1 Vern. W. 23.

255; *Ex parte Swift*, 1 R. & My. 575.

(*l*) *Ex parte M'Key*, 1 Ba. & Be.

(*k*) *Franklin v. Green*, 2 Vern. 405.

A legacy of £500 was given to an infant (*m*), payable at twenty-one, with interest at five per cent. in the meantime. The executrix advanced sums amounting to £650, by discharging payments made for the legatee, many of which were improper, though the greater part were beneficial. The legatee, on coming of age, assigned the legacy, and the assignee was held to be entitled, as against the executrix, to the legacy, with £4 per cent. from the time when it became payable; but without costs.

Such advances disallowed against assignee of legacy.

A legacy of £100, payable at twenty-one, with the interest for maintenance, and a gift over on death under age, was recovered in Chancery, notwithstanding that one of the executors had paid an apprentice fee of 100 guineas with the infant, and given him a legacy of £200, payable at the age of twenty-two (*n*).

Where children had fortunes not exceeding £300 each under a will (*o*), and one of the executors expended considerably more than the interest of their respective fortunes in their maintenance, education, and advancement, and in particular allowed £241 to one for the fee upon placing him with a surgeon, and the other expenses incident to that situation; the executor's claims for the excess above the interest was disallowed, as the rule is not to permit trustees of their own authority to break in upon the capital.

Trustees not allowed to break capital.

It has been said, that in making such advances a stranger is more favoured than a trustee, whose duty it is to preserve the principal entire (*p*).

(*m*) *Davies v. Austen*, 1 Ves. J. 247; S. C., 3 Bro. C. C. 178. (*o*) *Walker v. Wetherell*, 6 Ves. 473.

(*n*) *Lee v. Brown*, 4 Ves. 362. (*p*) 1 Ves. J. 249.

SECTION XII.

Other Matters relating to Maintenance.

Discretionary
power limited
to necessary
maintenance.

A TESTATOR having two daughters (*q*), directed his trustees, after the death of either, to pay so much of certain monies as should be necessary towards the maintenance and education of such child or children as she might leave, and to accumulate the residue for the children of both his daughters. One of the daughters died, and the allowance for the maintenance and education of her children was confined to so much as should be actually necessary; their father having by his will left them a considerable property, with a direction for maintenance.

Infant out of
jurisdiction;
maintenance
paid to person
within.

Where an infant resides out of the jurisdiction of the Court, the Court has authority, if the circumstances of the case require it, to order maintenance. Some person within the jurisdiction, and whom the Court can make responsible, is appointed to act as guardian, and is entrusted with the application of the money (*r*). In a case where a father absconded without having surrendered to a commission of bankruptcy, and took his infant son to America, and refused to allow him to return (*s*), a guardian was appointed for the son; and though Sir John Leach, M. R., refused to allow maintenance until the infant should be brought back, Lord Brougham gave liberty to the guardian to apply annually for an allowance for the infant's maintenance and education in America, producing certificates to shew the plan of education actually adopted, and the proper application of the money.

(*q*) *Rawlins v. Goldfrap*, 5 Ves.
440.

(*s*) *Stephens v. James*, 1 M. &
Keen, 627; *supra*, pp. 111, 131.

(*r*) *Logan v. Fairlee*, Jac. 193.

The gift, in a will, of a particular sum for maintenance, does not exclude an infant legatee from the ownership of the surplus profits (e).

A testator directed (g) his children generally to be maintained during the life of his wife, but distributed his property after her death in words which would not comprise after-born sons: they were held entitled to the former provision.

In another case, a direction (h) for maintenance, in general terms, comprehending all the children, was held not to be restrained by the bequest of the capital in terms limited to those living at the date of the will.

Where a father (i) by his will directed maintenance to be raised for his younger children out of settled property, under circumstances which made the direction ineffectual, the eldest son, to whom benefits were given by the will, and who was the only person interested in withholding the maintenance, was put to his election.

The Court has refused to direct (k) money to be paid out to an infant executrix, but has referred it to the Master to inquire whether there were any debts or legacies, and to consider of a maintenance.

Maintenance not raised out of reversionary term, unless expressly directed.

Maintenance will be allowed (l) out of an estate of which the accounts have not been taken, if the Court is satisfied by affidavit or otherwise that the funds are sufficient.

Portions or maintenance will be raised out of a reversionary term, when it is so expressly directed; but Lord Alvanley observed, in the case of *Clinton v. Seymour* (m), that the Court will lay hold of any words from which it can be

(e) *Earl of Stafford v. Buckley*, 2 Ves. 170, 182. (k) *Campart v. Campart*, 3 Bro. C. C. 195.

(g) *Matchwick v. Cock*, 3 Ves. 609. (l) *Jervoise v. Silk*, Coop. 52.

(h) *Froomantle v. Taylor*, 15 Ves. 365. (m) 4 Ves. 440, where the cases are collected and discussed; see also *Pierpoint v. Lord Cheney*, 1

(i) *Hume v. Rundell*, 2 S. & S. 174. P. W. 488, and Mr. Cox's note to *Butler v. Duncomb*, Ibid. 453.

fairly inferred that it was not intended to charge a reversionary term with raising portions in that manner, which must bring infinite inconvenience upon the reversioner ; and that if upon the context of the settlement any thing can be collected by which it may appear that it could not be the intention of the parties to raise them in that way, the Court has been extremely eager to lay hold of it. Upon this principle, in the case before him, when the term fell into possession, and the portion was raised, Lord Alvanley refused to charge the difference between the sum which had been annually allowed by the infant's grandfather for her maintenance, and the sum actually charged.

Lord Eldon, however, in a subsequent case (n), after adverting to the opinion of Lord Alvanley, declared the true rule to be as stated by Lord Talbot (o), that the raising or not raising must depend upon the particular provisions of the trust, and the intention of the instrument. He did not think the Court ought to be eager to lay hold of circumstances, but that it ought to hold an equal mind when construing the instrument, and that very small grounds, or such as do not sufficiently denote the intention, ought not to be relied on.

(n) *Codrington v. Lord Foley*, 6 Ves. 380.

(o) *Ca. temp. Talb.* 32.

CHAPTER XXIII.

TRANSACTIONS BETWEEN GUARDIAN AND WARD.

THERE are certain rules by which Courts of Equity are guided in the management and superintendence of infants' estates, and which they require all guardians to adopt. These rules will be considered hereafter; at present it is necessary to state a few principles directly affecting those transactions which may take place between guardian and ward.

It has already been stated (a), that an infant, even during minority, may, by *prochein-amy*, call his guardian to account; and that those guardians and receivers who are on the footing of officers of the Court, are obliged to account on application by petition, or motion. It is also settled (b) that where any person, whether a parent or a stranger, enters upon an infant's estate, and continues in possession, equity considers him as guardian, and will decree an account to be carried on after the infancy, unless the infant after coming of age has waived such accounts.

How account
may be obtain-
ed.

Against whom.

A guardian must not make profit by the infant's estate in any way.

In a certain case (c) the guardian being bound by recognition to account annually, had retained balances of money in his hands, and he was charged with interest upon the ba-

Where interest
will be charged.

(a) *Supra*, pp. 40, 108.

(c) *Dawson v. Mussey*, 1 Ba. &

(b) *Morgan v. Morgan*, 1 Atk. B. 230.

lances, although it was alleged that they had lain at his banker's, and had produced no interest.

If a guardian buys up the incumbrances upon his ward's estate at an under-value, he must not charge the ward with more than he paid (*d*).

Purchase of infant's estate set aside.

In an Irish case (*e*), under a decree for a sale of a competent part of certain leasehold interests, the property of a minor, (partly held for lives and partly chattel,) the person who acted as receiver of the estate, and appeared in the cause as guardian to the minor, purchased a lease for lives. The sale (although for full value) was decreed fraudulent and void, as it was wholly unnecessary, there being funds available for the same purposes to which the purchase-money was to be applied; and the purchaser having taken upon himself to surrender the lease and obtain a new one, the new lease was declared to be a trust for the persons entitled to the benefit of the former lease.

Guardian may buy estate of infant on majority.

In the case of *Oldin v. Sambourn* (*g*), Lord Hardwicke observed, that it was improper for a guardian to purchase his ward's estate immediately upon his coming of age; but although it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside.

Transactions between guardian and ward viewed with jealousy,

The connexion between guardian and ward is so close, the guardian's opportunities of acquiring knowledge of the ward's property and influence over his mind are so many and various, that where a man acts as guardian, or trustee in nature of guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage, either by a hasty and ill-considered settlement of accounts, or by way of direct bounty, immediately upon his ward or *cestui que trust* coming of age, and at the time of settling the account, or delivering up the trust. This rule is applicable wherever the

(*d*) *Henley v. —*, 2 Ch. Ca. 245. (*e*) *Carey v. Carey*. 2 Sch. & Lef. 173.

(*g*) 2 Atk. 15.

connexion and influence of guardianship has continued, though the ward may have been of age for some time before the date of the transaction. Undoubtedly if after the ward or *cestui que trust* comes of age, and has been actually put into possession of the estate, he thinks fit, when *sui juris*, and at liberty, to grant a reward for care and trouble, the Court could never set aside such a transaction; but the Court guards against its being done at the very time of accounting and delivering up the estate, as the terms on which the guardian will perform that duty; and so far has this vigilance been carried, that the relations of guardian and ward are in equity decisive against the validity of transactions which between strangers could not be impeached; and it is scarcely possible in the course of the connexion of guardian and ward, any more than in that of attorney and client, or trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty (*h*).

—even after majority, if influence continues.

Where accounts were settled between a guardian and his ward (*i*), a few months after the latter came of age, and were signed by her without having been examined by any one on her behalf, and without any delivery of vouchers; the accounts, too, being applicable only to a part of the receipts and expenditure, and waived by the guardian's delivering in a subsequent account, purporting to be an account from the commencement of the guardianship; the accounts settled between the guardian and ward were set aside.

Where settled, account will be opened.

Where a guardian (*k*), after his ward attained full age, continued to manage the property at the request of the ward, and before the accounts of his receipts and payments during the minority were settled; it was held that this was in effect

(*h*) See *Huguenin v. Baseley*, 14 Ves. 273; *Dent v. Bennett*, 4 M. & C. 269. (i) *Wych v. Packington*, 3 Bro. P. C. 46.

(*k*) *Mellish v. Mellish*, 1 S. & S. 138.

a continuance of the guardianship as to property, and that he must account on the same principle as if they had been transactions during the minority.

Under these circumstances, an injunction was granted, on terms, to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age.

A solicitor, who advanced money to an infant (*l*) for the subsistence of himself and his family, and acted as his confidential adviser, was held to be in the nature of a guardian to him; and an account settled between them within a month after the infant came of age, and without the latter having any assistance, was opened, notwithstanding the vouchers had been delivered up.

Where gift to
guardian will
be set aside.

A man who had lately come of age executed (*m*) a conveyance of a reversionary interest to a person who had been receiver of his estate during his minority. The deed was prepared by the receiver: it was expressed to be executed in consideration of a sum of money, and it contained the covenants usually granted by vendor to vendee; but it was in fact a voluntary conveyance. The grantor had no advice in the transaction; but no surprise or imposition was proved, and on his bringing a bill to have the deed delivered up, it was ordered that the defendant should execute a special release, by which the deed, though not cancelled, should be put entirely on its true footing of a voluntary deed.

A ward on coming of age and settling accounts, but before every thing had been delivered over to him, directed (*n*) his guardian, for his many kindnesses and services, to retain and invest a large sum of money in East India Stock in the guardian's name, and confirmed the gift by deed. It did not

(*l*) *Rosett v. Harvey*, 1 S. & S. 502. (*n*) *Pierce v. Waring*, 1 P. W. 121, n., Ed. Cox; S. C. cited also

(*m*) *Cray v. Mansfield*, 1 Ves. 1 Ves. 380; 2 Ves. 259; *Hylton v. Hylton*, 2 Ves. 548.

appear that there had been any imposition ; but after the ward's death the deed was set aside by Lord Hardwicke, in favour of his representatives.

An uncle had been (o) guardian and agent for his nephew for many years, and had become particularly acquainted with his estate. Soon after the nephew attained the age of twenty-one, the uncle (who was childless) obtained from him very beneficial leases, partly upon an inducement held out, that it would be ultimately for the benefit of the nephew, but without any security for the performance of such an engagement. The nephew's agent was not permitted by the uncle to interfere in the transaction. The leases were set aside with costs.

A man of weak understanding came of age (p) on the 16th of October, 1779, and within a fortnight from that time executed a lease of lands at an inadequate rent, in favour of a son of his guardian. He married in 1780, and died in 1792, but continued during his life under the original dominion and control of the guardian and his family. His son came of age in 1807, and filed a bill in 1812 to have the lease set aside. The decree was in his favour, and the length of time was held, under the circumstances, to be no bar to his claim.

A guardian obtained from his ward (q), in 1780, just after she came of age, a conveyance of the advowson of a rectory of which he was the incumbent. The circumstances brought this transaction clearly within the principle of the cases lately stated. The relation of guardian and ward virtually continued till 1784, when the ward married the guardian's brother, who was the attorney who had prepared the deed ; and in 1800, after the death of the guardian, she and her husband filed a bill to be relieved against the conveyance. Lord Eldon, considering that she had never been a free agent, and

(o) *Dawson v. Massey*, 1 Ba. & B. 219. (p) *Aylward v. Kearney*, 2 Ba. & B. 463.

(q) *Hatch v. Hatch*, 9 Ves. 292.

that length of time did not present a great objection in the case of property of that particular nature, ordered the instrument to be delivered up to be cancelled, but on account of the conduct of the husband as *particeps criminis*, he made the order without costs.

Person about
to marry ward,
protected.

This protection has been extended to the case of a person about to marry a ward.

Where there had been (r) a covenant in articles deliberately entered into before marriage, that the intended husband should within two days after the marriage release to the mother and guardian all accounts of the mesne profits of her daughter's estate, Lord Cowper set aside the covenant, as having been extracted from the husband by one who had a power over the young lady, which ought not to have been made use of in that manner, and as tending to encourage guardians to sell infants under their wardship.

(r) *Duke of Hamilton v. Lord Mohun*, 1 P. W. 118.

APPENDIX I.

HUGHES *v.* SCIENCE—20th March, 1740 (*a*).

(6 HILL, MSS. 8) (*b*).

HUGHES, the infant's father, dying intestate, his personal estate, which was very considerable, came to the mother and infant. After, the mother likewise died, and bequeathed her share to the infant, in case she attained twenty-one, and made the defendant, Science, her executor and trustee for the infant; his wife, who kept a boarding-school, having the infant under her care. Sometime after, Hughes, the infant's uncle, apprehending that Science had embezzled and wasted great part of the infant's effects, brought his bill in equity against him for an account. Science, making several applications for time to answer, and still neglecting to put one in, was at last served with a subpœna, and upon that he alleged in excuse that he would consult the defendant, Mitchell, a barrister at law, (and justice of peace,) what answer to make. Soon after, he and Mitchell go together to Doctors' Commons, and Mitchell procures himself to be admitted guardian or curator in the Spiritual Court, to consent to the marriage of the infant to the defendant, Science, *and for all other purposes of the law*; and accordingly a license was granted, and a marriage had, the infant being at the time about sixteen, and Science, the husband, sixty.

Upon which Hughes, the uncle, now petitioned the Court against Science, for marrying the infant after suit commenced in this Court, without leave of the Court, and likewise against Mitchell, and Williams, the clergyman, who married them together, as parties to the contrivance,—that they might stand committed.

LORD CHANCELLOR.—In all my experience, though I have seen several cases of marriage of infants without leave of Court, yet I

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(*a*) *Supra*, p. 74; 3 Atk. 601, S. C.

(*b*) In Lincoln's Inn Library.

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never met with a case attended with such iniquitous circumstances. I could wish it was in my power to annul the marriage,—but that the Legislature might do with the lady's consent, and I think it a matter very proper for their interposition. The laws of the country had taken great care of infants, both their persons and estates, and particularly to prevent marriages to their disparagement. For that purpose it had assigned them guardians; and if a stranger married without the guardian's consent, it was considered a ravishment of ward, and the party was deemed punishable by fine and imprisonment; and so it was if the guardian himself married the infant to another to its disparagement. And the Court has originally exercised a superintendent jurisdiction over guardians in behalf of infants, to prevent abuses either in their persons or estates, as well as in behalf of the Crown and inferior lords, who had formerly a great interest in the wardship of infants. Afterwards, indeed, the Court of Wards being created, took the jurisdiction out of Chancery for a time; but as soon as that Court came to be dissolved, the jurisdiction devolved again upon the Court, and infants have ever since been considered as under the immediate care of Chancery. Whenever a suit is commenced here on their behalf, and even without suit, the Court every day appoints guardians on petition; and the marriage of an infant to his guardian or any other without the consent of the Court, where a suit is depending here in behalf of the infant, has been always treated and punished as a contempt, and that without regard even to the quality or estate of the party whom the infant marries, as in the Lord Shaftesbury's case (c), who was married by the contrivance of his mother, without consent of the guardian, *pending a suit in Chancery*; and though the lady whom his Lordship married was nowise an unsuitable match for him in rank or fortune, yet the Court, notwithstanding, committed the parties, and ordered a sequestration against Lady Shaftesbury, the mother. So that this is a much stronger and plainer case for the Court to interpose in, here being both a great disparity in fortune and in age, and many other circumstances to aggravate the fact, for Science was executor and trustee for the infant: he had likewise the custody of the infant's person, under his wife's management, at school, and so in effect a guardian.

(c) *Supra*, p. 196.

In behalf of the defendant many matters have been urged, but none material. First, it is said here was no answer put in by Science in the former cause, and till after bill brought and answers put in, infants are not considered as under the direction of the Court; and for this a case in Lord Talbot's time is cited, of a bill brought by creditors against an infant, on articles of agreement, for satisfaction of their debts; and, as the counsel states it, the Court held, that unless the defendant would consent to put in his answer, the bill alone could not bring him before the Court. I know nothing of that case, but it may perhaps have been so held, and yet not on the reason that there was no answer put in, but because the bill brought was not a bill of a proper nature to bring the infant before the Court; for it is not any bill that is sufficient for that purpose. But it ought to be a bill for the direction of the Court in relation to the estate or person of the infant, and for his benefit; and that, I suppose, was the ground of that case; but as to the necessity of putting in an answer, there is nothing in that point, for an infant is always considered under the care of the Court, if a suit be depending; and it may properly be said to be a *lis pendens*, if a bill be filed, though no answer be put in; and after such bill filed, it is a contempt to marry an infant without the consent of the Court; whereas here is not only a bill filed, but a subpoena for want of an answer.

Then it is said, that Science applying for a license, and Mitchell's being appointed guardian, shew plainly that they are innocent in fact, since they might have gone to the Fleet or elsewhere, and have been married without any license at all; that since the Spiritual Court thought fit to grant him a license, he might very well think he was doing right, so that at most he was but misled by the act of the Court. Admitting this excuse to be true, it will not do, because it is not material in what manner the marriage was had, *because here is a marriage without leave of Court*, which, as I said before, is a contempt of Court without more. And as to the Ecclesiastical Court, I think it is a very extraordinary jurisdiction which they claim, of admitting guardians in this general manner to answer all purposes of the law. They have no power to appoint guardians in any case, except guardians *ad litem*, for the purpose of carrying on suits there in behalf of the infant. Nor have they any jurisdiction to grant marriage licenses of course, as they have done in this case. I think these are very unwarrantable pro-

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What bill is
necessary to
bring an infant
before the
Court.

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ceedings, and that the Courts of Law ought to grant prohibitions or informations in nature of a *quo warranto*, to shew by what authority they exercise such a jurisdiction. But however the Ecclesiastical Court may use to grant licenses of course, yet it is certain they would never have granted it here, had they known the circumstances of the case, and therefore it is so far from being an excuse, that it is a most gross contrivance in setting the act of one Court to elude the justice of another, and, instead of shewing the innocence of the parties, it proves that their design was concerted, and that they had taken every step they possibly could for their security.

With regard to defendant Mitchell, I think his case, if possible, blacker than the rest, considering the circumstances in which he stands before the Court, as a man in great years, as a barrister at law, and counsel likewise for the defendant, Science, and also as a justice of peace. And it was the ancient method, when justices of peace had been guilty of malpractices, to remove them from their office, which, I think, will be very proper for me to do in this case.

As to Williams, the clergyman, it does not appear in the cause that he was at all a party to the contrivance, and so he has not incurred the censure of the Court; though if he had been privy to it, the license would not have protected him any more than the rest.

Therefore I declare that Science and Mitchell have been guilty of a very high contempt of the Court, and of a most fraudulent and wicked practice, in marrying the plaintiff, being an infant under the care of the Court, to the defendant Science, without the leave of the Court; to the great disparagement of the infant, with intent to elude the justice thereof.

And I order that the defendants Science and Mitchell do stand committed to the prison of the Fleet, and that the warden of the Fleet do take care that they be confined close prisoners within the walls of the said prison, without the benefit of the rules.

And I do further order that the said Simon Mitchell be removed from his office of justice of peace for the county of Middlesex, and that a writ of *supersedeas* do forthwith issue for that purpose; and I reserve consideration how far and by what legal method the said Simon Mitchell may for his said offence be degraded from being a barrister at law, or restrained from acting as such; and to the end that the estate of the infant, the plaintiff, may be secured and forthcoming, in order to make a settlement on the infant, or a provision for her, I

APPENDIX.

v

do order that the defendant Science be restrained from aliening, transferring, or transposing any part of the real and personal estate of the infant, and from receiving any part thereof without leave of the Court till further order; and that defendant Science do bring before and leave with the Master all mortgage bonds and other securities belonging to the estate of the plaintiff, the infant, upon oath, subject to the further order of the Court.

I.
HUGHES
v.
SCIENCE.

APPENDIX II.

IN RE BISHOP (*d*).

Reg. Lib. 1774, A., p. 185; Hil. 15 Geo. 3, 23 Jan. 1775.

UPON consideration this day had of the Right Honourable the Master of the Rolls, of the humble petition of Charles Bishop, setting forth that Francis Bishop, Gent., the petitioner's late father, died in the year —, leaving the petitioner, his eldest son and heir at law, of the age of seventeen years and upwards, possessed of considerable real and personal estate, and also leaving five other children. That the petitioner's said late father, a short time before his death, made his will, and appointed Elizabeth, his widow, the petitioner's mother, sole executrix thereof; but appointed no person testamentary guardian to the petitioner. That the petitioner, on the death of his said father, became possessed as tenant in tail, under the settlement made on the marriage of his said father and mother, to all his real estates, and also to the remainder in fee. That the petitioner is desirous that his grandfather may be his guardian.

II.
IN RE BISHOP.

It is therefore ordered, that it may be referred to Mr. Holford, one of the Masters of this Court, to approve of a proper person to be appointed guardian of the person and estate of the petitioner, and that all parties concerned have notice to attend the said Master; and the said Master is to state to the Court what relations the infant has, and on what evidence or ground he approves of any particu-

II. lar person to be such guardian; and after the said Master shall have
IN RE BISHOP. made his report, such further order shall be made as shall be just.

Upon opening of the matter this present day (e) unto the Right Honourable the Lord High Chancellor of Great Britain, by Mr. Kenyon, being of counsel with Charles Holland, Gent., it was alleged, that, by an order dated the 14th day of February last, it was ordered that the report therein stated should be confirmed, and that the said Charles Holland, the grandfather of the said Charles Bishop, should be appointed guardian to his person and estate.

That it appears, by the affidavit of the said Charles Holland and William Waddington, that the said Charles Holland having been appointed guardian of the said Charles Bishop as aforesaid, had agreed with Elizabeth Bishop, mother of the said Charles Bishop, to have her son at home, and that he would call on her at Brailes, in the county of Warwick, in his return from London, where he [i. e. the infant] and the said Elizabeth Bishop then were, and that he would then take the said Charles Bishop home with him into Shropshire, and take him clerk, or put him to some other proper business; and that he did accordingly call at Brailes in his way to Shropshire, but was there then told that the said Charles Bishop had been taken by, or was gone a day or two before away with, Mr. John Ball, a reputed Catholic Priest, and his said mother (who is a Roman Catholic also); and that he, the said Charles Holland, had not since heard of him, the said Charles Bishop, but that he was gone beyond sea, though he had done all in his power to find him out, or his place of residence, but to no purpose; though he, the said Ball, had since sent to him, the said Charles Holland, and acknowledged his taking the said Charles Bishop away in company with his mother, but refused to tell to what place or where he, the said Charles Bishop, then was, under a pretence of ignorance, but said he believed beyond sea; and that he, the said Charles Holland, believed that the said Elizabeth Bishop, by the advice of the said John Ball, had carried him away and deposited him in some Popish place in this kingdom or abroad, without the knowledge, consent, or permission of him, the said Charles Holland, and to prevent his having the custody of the said Charles Bishop's person. And therefore it was prayed, that the said John Ball may produce the said infant, and may stand committed to his Majesty's prison of the Fleet for conveying him away and secreting him.

(e) Reg. Lib. 1774, A., p. 461; Trin. 15 Geo. 3, 19 June, 1775.

Whereupon, and upon hearing the said order, dated the 14th day of February last, and the said affidavit of the said Charles Holland and William Waddington, read, and of what was alleged by the counsel for the said Charles Holland,

II.
IN RE BISHOP.

His Lordship doth order, that the said John Ball, upon having four days' personal notice hereof, do produce and leave the said Charles Bishop, the infant, with the said Charles Holland, his guardian, on or before the first seal after this Term; or, in default thereof, that the said John Ball do stand committed to his Majesty's prison of the Fleet.

APPENDIX III.

MOOR v. LACY,

LINCOLN'S INN HALL—11th April, 1746.

(11 HILL, MSS. 334.)

THE bill in this case was brought by the plaintiff, as devisee of one Mary Bone, who was the posthumous daughter of David Bone, for an account of the rents and profits of her estate received by the defendant, who had married the testatrix's mother, and who had maintained the testatrix for about twenty years during her infancy; and by the decree an account was directed to be taken, and the Master was to see what was fit to be allowed for the infant's maintenance during her minority. The account was taken accordingly; and as to the maintenance, it appeared that the rents of the infant's estate amounted to 175*l.* a-year, subject to a clear rent-charge of 50*l.* a-year: that there was timber of considerable value on the estate, and that the estate, since the death of the testatrix, had been sold for 5,600*l.*; and the Master by his report allowed several gross yearly sums for the infant's maintenance, increasing from time to time during the minority, viz.:—

III.
MOOR v. LACY.
What rules a Court of Equity goes by in appointing infant's maintenance.

For the first four years, 30*l.* a-year;

In the next three years, 35*l.* a-year;

In the next year, 40*l.*;

For the next five years, 50*l.* a-year;

III.
MOOR v. LACY.

For the next year, 60*l.*;

For the next two years, 70*l.* a-year;

For the next two years, 80*l.* a-year;

and for the remainder of the time—the whole of the rents and profits received by the defendant.

To this report the defendant took several exceptions: First, that he had kept exact accounts of what he had expended in the infant's maintenance, and that the Master ought to have allowed the particulars thereof.

In support of this exception it was argued, that the annual income of the estate ought not to be a determinate measure for the quantum of the maintenance: That in the present case, though more was expended in some years than the amount of the income, yet in other years there were great savings, and such exceedings were spent out of the savings.

That the Master had gone upon a mistaken ground in allowing gross annual sums for the maintenance. For it is the usage of the Court to make such allowance for maintenance before the maintenance had, for there the uncertainty of the thing requires it; and even in such cases a liberal allowance, suitable to the degree, quality, and estate of the infant, is always allowed. But where the question upon the allowance arises *ex post facto*, it is different, for then there is a clear and certain rule to go by—to allow what shall appear to have been properly expended by the guardian: That the rule of the civil law is, that the curator, who is considered as acting for the good of the infant, should be allowed his whole expenses, so as they appear reasonable, and not to exceed the income of the estate: That the civil law supposes mutual engagements between the curator and the infant; on the one hand, that the curator should use all reasonable diligence in taking care of the infant and his estate; and on the other hand, that he should be repaid all his disbursements: That in the present case, here appears to have been no misbehaviour in the defendant: That he has accounted fairly for what he has received, and therefore ought to be favoured: That the worst that can be said is, that he has been too kind to the infant, in having spent more upon her than he ought.

A gross sum always allowed, whether for past or future maintenance.

LORD HARDWICKE, Chancellor.—The general rule of the Court in cases of this kind, whether in the consideration of future or past maintenance, is, to allow a gross annual sum proportioned to the

age and quality of the infant, and quantum of the estate, not laying down any strict rule.

III.
MOOR v. LACY.

The reason as to future maintenance is obvious, and the reason is plain too as to past maintenance, arising from the great expense it might be to the infant's estate to take a particular account of the maintenance; and there is another reason which may have weight too; which is, that it is a rule in taking accounts in this Court, to allow the party accounting all sums claimed as laid out under 40s., upon no other evidence than his own oath. To say then that a guardian should be permitted to pass an account of his maintenance of the infant, would be in effect to say he should be allowed what he would please to swear to, for the particulars of such account must in their nature be mostly under 40s.

And though in the present case it is said that this guardian has kept a particular account, yet how is that verified? A book is produced, but it does not appear to be a book of daily expenses, but an account appearing upon the face of it to be made up at once, and it does not appear from what the account is formed. It is possible things might be thrown in to make up the balance; and in the defendant's affidavit to claim the allowance of sums under 40s., he speaks only to his *belief*. But the rule of the Court as to this is, that the affidavit must be positive, and not to depend on belief.

How the rule of evidence in a Court of Equity of allowing an accountant all sums under 40s. upon his own oath, is to be understood.

But upon the whole I think that the Master in some of the years has been rather too strait, and therefore I shall direct £275 to be added to the whole amount of his allowance for the maintenance, which upon the whole will be about two-thirds of the income of the estate.

The next exception was, for that the Master had not allowed to the defendant several sums of money mentioned in the exception, amounting to about 20*l.*, paid for physic and doctors' fees on account of the infant for the whole twenty years.

Where gross sum allowed for maintenance, whether guardian shall also be allowed expenses for doctors' fees and physic:—

But Lord Chancellor overruled this exception, for that here did not appear to be any extraordinary illness to entitle the guardian to a particular allowance for it; and said that these expenses are to be considered as included in the general allowance for the maintenance.

Another exception was, for that the Master had not allowed the defendant several sums of money paid by him for several things mentioned in the exception to have been bought for the infant's use.

III.
MOOR v. LACY.

—whether for
things of orna-
ment or plea-
sure, or for
books:

And some of these particulars Lord Chancellor allowed, as money paid for a silver snuff-box, for a gold watch, for a pair of diamond ear-rings, &c., for he said that such things might be considered as proper ornaments for her person; and he allowed likewise money paid for a spinnet, a pad, &c., but disallowed several small items for books, &c., which he said ought to fall within the general allowance for maintenance; and said, it was never known, where a general sum was allowed for the maintenance of a young gentleman, that the guardian should be allowed a charge for books, for it is part of the allowance for his education.

—whether for
pocket money.

Another exception was, for that the Master had not allowed to the defendant several sums mentioned in the exception to have been paid by the defendant to the infant. These sums were several small sums, that appeared, from the nature of them, to have been paid to the infant from time to time for pocket money.

To support this exception, defendant would have produced a book proved to be of the infant's own handwriting, wherein all these sums were set down to be received by her.

But Lord Chancellor overruled the exception, saying that such sums for pocket money ought to be considered as allowed in the general allowance made for the maintenance.

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A TREATISE
ON THE
LAW RELATING TO INFANTS.

8^o 2. 1. 152. 2. 15

A TREATISE

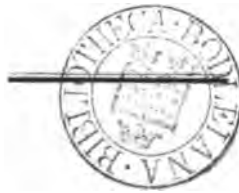
ON THE

LAW RELATING TO INFANTS.

BY

WILLIAM MACPHERSON,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.



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ADDENDA ET CORRIGENDA.

Page 123, n. (*k*), for "Jac. 264, n." read "2 Russ. 22."

Page 133, line 2, after the word "committed," insert "(*U*)"; and at the foot of the page before n. (*m*), insert "(*U*), *Mr. Long Wellesley's Case*, 2 R. & My. 639."

Page 244, last line, for "during her husband's infancy," read "for her husband."

Page 255, n. (*o*), add "but see page 337, *infra*."

Page 420, n. (*s*), add "the position in the text is confirmed by the language of Lord Eldon in the case of *Monday v. Monday*, 1 V. & B. 223."

PART THE SECOND.

CHAPTER XXIV.

OF SECURING THE PROPERTY OF INFANTS.

THE powers and duties of the different kinds of guardians, with respect to the property of their wards, have been already touched upon in the chapters which relate exclusively to guardianship. The powers and duties of persons who hold property for infants by virtue of any deed or will, vary according to the terms of the instrument under which they are entitled; and their first object should always be, to observe the regulations so prescribed. But parents, guardians, trustees, executors, receivers, and all persons whatever who hold, with or without authority, any property belonging to infants, though their powers over the estate may be various, are yet equally bound to secure, to manage, and to account for such parts of it as come within their reach; and are subject to all the rules by which trustees are required to be guided, and to some others having peculiar reference to the infancy of those for whom they act. Of the latter class of rules it is now proposed to give some account. But it seems unnecessary, in a treatise on the law relating to infants, to go into any detail with regard to the *general* duties of trustees and executors; which are only affected by the infancy of the *cestuis que trust*, inasmuch as it is impossible that there can be any circumstances of conduct in them to give authority to the trustees, as there may be in adults (*a*); and which have

All persons who hold infant's property subject to rules of trusteeship ;

and to other rules having reference to infancy ;

the latter are to be stated.

(*a*) See 3 Swanst. 87, n.

been fully discussed in works especially devoted to the subject (*b*).

Court of Chancery manages property of its wards.

Rules for securing property for the purposes of the trust.

Ward of court having real estate ;— receiver appointed.

Unless trustee chooses to manage,

—who must act under sanction of Court.

Reference for receiver.

The Court of Chancery, also, has important duties to discharge in securing and managing the property of its wards.

It seems proper to consider, in the first place, how the estate ought to be taken possession of and secured for the purposes of the trust which exists (*c*) in the case of every infant who has property.

Where the infant has been made a ward of Court by the institution of a suit, if he has real estate, the modern practice is to appoint a receiver of the rents and profits (*d*). This is done without the slightest regard to the rights of any guardian (*e*), who, if not in possession, need not even be a party to the suit, and, if in possession, will, as a matter of course, be superseded, and even, if necessary, be restrained by injunction from interfering with the estate (*g*). If there be a trustee who chooses to manage the estate, he will not be superseded by a receiver, unless there is some reason to think that the interests of the infant will not be perfectly safe in his hands; but from the time when the bill is filed, he must take no step without the sanction of the Court, whatever may be his powers under the instrument creating the trust (*h*).

Where it is proper that a receiver should be appointed, a reference is directed (*i*) to the Master to appoint a proper person to be receiver, and to allow him a salary; the person so to be appointed receiver first giving security, like a guardian of the person and estate (*k*), to account annually, or as the

(*b*) See Lewin on Trusts, and Williams on Executors, *passim*.

(*c*) 1 Ves. 482.

(*d*) See p. 106, *supra*. As to receivers in general, see Seton on Decrees, pp. 316, 332.

(*e*) See pp. 117, 118, *supra*.

(*g*) *Brooks v. Cooke*, Set. Dec. 309.

(*h*) See *Webb v. Shaftesbury*, 7 Ves. 480.

(*i*) Set. Dec. 316, 319.

(*k*) See p. 108, *supra*. The security is usually the recognisance of the receiver, and two sureties, and is given to the Master of the Rolls, and the senior Master in Chancery.

Court shall direct, and to pay his balances into Court. If the nature of the property requires it, the Court will appoint consignees of the produce, who must, like receivers, give security for the discharge of their duties, unless special circumstances are shewn to the Court (*l*).

Appointment
of consignee.

The tenants of the estate are directed to attorn and pay their rents to the receiver, who is to be at liberty to manage, set, and let, with the approbation of the Master. Exceptions will lie to the Master's report of his appointment of a receiver (*m*), or it may be brought before the Court by petition (*n*); but if the report is not objected to, no further order is necessary (*o*). If the infant afterwards becomes entitled to additional property, the existing receiver is generally appointed receiver of such property, and gives further security (*p*).

Exceptions
to report.

Receiver for
additional pro-
perty.

A receiver of an infant's estate may be appointed even where one is not prayed for by the bill, and the reference may be directed, if necessary, as soon as the bill is filed, and before service of subpoena to answer (*q*).

It is said, in the case of *Dalmer v. Dashwood* (*r*), to be usual to put receivers upon infants' estates which are in mortgage, without having the mortgagees before the Court: but Sir W. Grant, M. R., in a modern case, where a mortgage appeared on the face of the pleadings, and the mortgagee was not before the Court, refused to appoint a receiver (*s*).

Whether re-
ceiver appoint-
ed when estate
is in mortgage,
and mortgagee
not before the
Court; *Query?*

The next friend (*t*) in the suit, or his son (*u*), ought not to

What persons
ought not to
be receivers.

(*l*) *Cobham v. Cobham*, 5 Jurist, 831. See Set. Dec. 327.

(*q*) See p. 105, *supra*; 1 Atk. 489, 578; *Pitcher v. Helliar*, Dick.

(*m*) *Thorpe v. Sharpe*, 12 Ves. 317.

580.

(*r*) 2 Cox, 382.

(*n*) *Wynne v. Lord Newborough*, 15 Ves. 283; *Attorney-general v. Day*, 2 Madd. 246.

(*s*) *Price v. Williams*, G. Cooper, 31.

(*o*) Set. Dec. 321.

(*t*) *Stone v. Wishart*, 2 Madd. 64.

(*p*) *Supra*, p. 107. *Inwood v. Teyne*, 2 Ed. 152.

(*u*) *Taylor v. Oldham*, Jac. 529.

be receiver, nor the solicitor (*x*) in the cause, nor a person who is sole guardian (*y*).

Possession of the receiver.

The possession of the receiver does not oust the possession of the infant (*z*).

Personal estate should be got in and invested.

As to personal estate, the regular course of the Court is, to get in all the money due to the infant, and to invest it in the three per cents., as the fund in which it will be most secure, and most readily available when he comes of age. In respect of chattels in which the infant's interest is only reversionary, he stands, generally speaking, on the same footing with persons of full age; but the bill of an infant remainder-man merely stating, without any proof, that the fund is in danger, entitles him to an account, though the testator may have left the fund on the existing security (*a*). A receiver will, if necessary, be appointed to collect and get in the outstanding personal estate, and the debts due and owing in respect of it; and he is generally the same person who is appointed receiver of the real estate (*b*). But if there is an executor, whose duty it is to get in the personal estate, he will not be interfered with, except under strong circumstances of suspicion, though an administrator is treated with less consideration (*c*). Where, however, the testator's debts have been paid, the Court always takes the earliest opportunity of requiring the executor to pay in the money which he has in his hands (*d*); and it will not allow him to take out of Court a fund which, if received, it would be his duty to pay in. Thus, on a bill by an executor to recover a fund belonging to his

Executor, after payment of debts, must pay monies into Court;

and not allowed to take out what, if received, ought to be paid in.

(*x*) *Garland v. Garland*, 2 Ves. J. 137.

(*y*) *Supra*, p. 105. See 1 Molloy, 225, where L. C. Hart expressed his determination to alter a practice of the Irish Court of Chancery, by which, in the absence of suitable persons connected with the family, one of the Masters of the

Court was assigned to be the guardian of the infant's fortune.

(*z*) 3 P. W. 379.

(*a*) *Singleton v. Singleton*, 2 Moll. 520.

(*b*) *Brooke v. Cooke*, Set. Dec. 309.

(*c*) *Middleton v. Dodswell*, 13 Ves. 266.

(*d*) *Blake v. Blake*, *supra*, 118.

testator, it appearing that the testator's debts were paid, and that the fund was bequeathed to infants; the Court refused to have it transferred to the executor, but directed the bill to be amended by adding the infants as co-plaintiffs, and secured the money in Court for their benefit (e); and, after a decree for an account, a trustee or executor, whatever may be the language of the instrument under which he acts, is not allowed to deal with the assets for the purpose of investment, without the order of the Court (g).

Money is not allowed to remain outstanding on personal security, as, for instance, upon bond; at least not without a particular reference to the Master, to inquire whether it would be for the benefit of the infant that the money should remain out on that security, or on any other and what additional security, or should be called in and laid out in any other and what security (h); nor is it left out upon the security of a judgment merely (i). If advantageously invested in real securities it need not be called in (k).

Money not left out on personal security without reference;

nor on judgment. May be left on real security.

Where part of the fortunes of infants was outstanding on mortgage, the mortgagor having offered either to pay it off, or to let it remain at a reduced rate of interest, it was referred to the Master to inquire into the value of the mortgaged estate; and if he should find that it was an ample and adequate security, the money was to remain outstanding at the reduced rate until the minors should respectively attain twenty-one (l).

Property is not called in, in any case, where the Court is satisfied that it will be for the infant's benefit to leave it in its actual state of investment; as where the Master stated in his report, that it would be for the benefit of an infant defendant that certain property in India, bequeathed to him,

Not called in, where beneficial to leave it.

(e) *Orrok v. Binney*, Jac. 523.

(i) *Knox v. Knox*, 1 Hogan,

(g) *Widdowson v. Duck*, 2 Mer. 117.

494.

(k) See 1 Beav. 381.

(h) *Newell v. Been*, 2 Molloy, 280.

(l) *Hoey v. Hoey*, 2 Molloy, 278.

should remain in India upon the securities in which it was invested; it was contended, that the property ought not to be permitted to remain out of the control of the Court; but the Master of the Rolls refused to call it, asking—"Does the Court necessarily call in mortgages in Ireland or Scotland?" (*m*)

Outstanding money laid out on mortgage of the infant's own estate.

If the infant has money outstanding, a reference may be obtained, to inquire whether it will be for his benefit that the money should be laid out in the purchase of any existing charge on his real estate: but so strong is the preference for the three per cents., that a reference, with a view to the investment of outstanding monies on mortgage, will only be granted under special circumstances, as where there is a mortgage or charge on the infant's own estate (*n*).

Management by guardian out of Court;—

he must call in money, and invest in the funds, or on security of infant's real estate;

If the infant is not a ward of Court, the guardian or other person entrusted with his property must act, as to the real estate, according to his own powers as guardian or trustee: he must also follow any special directions, and he may exercise any powers, contained in the instrument under which the infant is entitled; and he must, in the absence of such directions or powers, call in the money due to the infant, and invest it in the three per cents., or in the purchase of any existing charge on the infant's real estate; or he may leave it out, if he finds it on good mortgage security; but if he lays it out on mortgage of any other real estate than the infant's (*o*), or if he leaves it out (*p*), or, having got it in, invests it, upon personal security, he does so at his own risk, even though he has express authority to lay out the money in such manner as he shall think most for the infant's advantage, and though the borrower is unquestionably solvent at the time (*q*). It is

leaves it on personal security at his own risk.

(*m*) *Sadler v. Turner*, 8 Ves. 617.

(*n*) *Crouse v. Hunter*, 2 Ves. J. 167; *Anon.*, 6 Madd. 9; *Norbury v. Norbury*, 4 Madd. 191; *Widdowson v. Duck*, 2 Mer. 494; *Ridgeways*, 1 Hogan, 309.

(*o*) *Orr v. Newton*, 2 Cox, 274; *Howe v. Earl of Dartmouth*, 7 Ves.

150.

(*p*) *Wall v. Buckley*, 2 Cha. Rep. 97; S. C. Eq. Ca. Ab. 263.

(*q*) *Gilb. Lex Prætoria*, 341; *Terry v. Terry*, *Gilb. Eq. R.* 10;

scarcely necessary to add, that the infant's money must not be allowed to remain in trade (*r*). The investment of an infant's money on mortgage may, if beneficial to him, receive the retrospective sanction of the Court (*s*).

Where trustees are expressly authorized to lend on real securities in England, Wales, or Great Britain, they are now empowered by act of Parliament to lend, with the consent mentioned in the act, on real securities in Ireland. But all loans in which any minor or unborn child is interested, must be made by the direction of the Court of Chancery, to be obtained *in any cause* upon petition in a summary way (*t*); and the Court will not give such direction unless it is shewn that the transaction will be for the infant's benefit (*u*).

Infant's money not to be invested on Irish securities, under 4 & 5 Will. 4, c. 29, unless the transaction is beneficial.

The stat. 1 Will. 4, c. 60, provides (*x*), that where the person, or any of the persons, to whom any money shall be payable in or towards the redemption or discharge of any mortgage or incumbrance of which a release or conveyance shall be obtained under the powers of the act, shall be an infant, it shall be lawful for the person by whom such money shall be payable, to pay the same into the Bank of England in the name and with the privity of the accountant-general of the Court of Chancery (*y*), to be placed to his account in trust in any cause then depending in the Court concerning such money, or, if there shall be no cause, to the credit of the infant, subject to the order and disposition of the Court, or to such person or persons, or in such other manner, as the Court shall direct; and the Court is empowered to order any money which shall be so paid in, to be invested in the public funds; and to order

Money belonging to infants on mortgage, to be paid into the bank.

S. C. Prec. Cha. 273; see 3 Swanst. 62, 63, 87.

Vict. c. 5.

(*r*) *Killick v. Fleahey*, 4 Bro.

(*u*) *Stuart v. Stuart*, 10 L. J.

C. C. 160; *Booth v. Booth*, 1 Beav. 125.

(*x*) Sect. 14.

(*s*) See *Cotham v. West*, 1 Beav. 381.

(*y*) Or of the Court of Exchequer; but its jurisdiction has since been transferred to the Court of Chancery: see 5 Vict. 5.

(*t*) 4 & 5 Will. 4, c. 20; 5

distribution thereof, or payment of the dividends thereof, as shall seem reasonable(*z*).

Debts may be compounded or released, if beneficial.

Infants as well as adults are, it seems, bound by the composition or release of a debt by a guardian, executor, or trustee, if the act appears to have been for the benefit of the trust estate(*a*).

Legacy to infant, which would be payable *in presenti*, must not be paid to infant or any one for him.

It is a general rule, (though there was in former times a difference of opinion on the point), that where a legatee is an infant, and would be entitled to receive the legacy if he were of age, the executor is not justified in paying it, except for purposes of maintenance or advancement, either to the infant, or to the father, or any other relation of the infant, on his account, without the sanction of a Court of Equity(*b*). If a writ be instituted in the Spiritual Court for an infant's legacy by the father, to have it paid into his hands, an injunction or prohibition will be granted, because the Court will not allow the money of an infant to come into the father's hands(*c*).

Prohibition where father sues for it in Spiritual Court.

Executors paying to father liable to pay over again.

In consequence of this rule, executors who pay to a father will be liable to pay the legacy over again to the legatee on his coming of age, and this even under circumstances of hardship on the executors.

In a case(*d*) where the executor paid an infant's legacy to the father, and took his receipt; when the legatee came of age, the father told him that he had such a legacy of his in his hands, but could not pay it immediately, and requested him not to apply to the executor, at the same time promising that he would himself pay it. The son acquiesced for fourteen or

(*z*) See pp. 217, 218, *supra*.

Ab. 300; 1 P. W. 285; Gilb. Eq.

(*a*) *Blus v. Marshall*, 3 P. W. 381.

R. 100; *Philips v. Paget*, 2 Atk. 80; *Willoughby v. Earl of Rutland*,

(*b*) See Ward on Legacies, 276; 2 Williams on Executors, Part 3, Book 3, ch. 4, s. 5. See *Holloway v. Collins*, 1 Ch. Ca. 245; *Bil-*

Nels. 38.

son v. Saunders, Bunb. 240; *Doyley* or *Dagley v. Tolferry*, 1 Eq.

(*c*) *Rotherham v. Fanshawe*, 3 Atk. 629; see 1 Atk. 491.

(*d*) *Doyley* or *Dagley v. Tolferry*, *ubi supra*.

fifteen years, during which period his father and he carried on a joint trade, and then became bankrupt; on a commission taken out against the son, his assignee filed a bill against the executor for an account and payment of the legacy, which was decreed accordingly by the Master of the Rolls, but without interest; and the decree was affirmed by the Lord Chancellor on an appeal, but his Lordship, on the hardship of the case, ordered the deposit to be divided.

The acquiescence, however, of the legatee after he comes of age, will generally confirm a payment improperly made during his minority; and Lord Alvanley has remarked(*e*), that, in the case just cited, the bill would have been dismissed on this ground, if the legatee had not been the son of the person to whom the payment was made; but that the acquiescence of a child, even after he becomes of age, does not bar him.

Payment may be confirmed by acquiescence after majority,

except between parent and child.

When, however, the direction to the executor is not to pay the legacy to the child, but the bequest is made to the father or some other person as trustee, wholly or in part, for the infant,—as, “to A., to be equally divided between himself and his family,” or “to B., for her and her children’s use,”—the legacy may be safely paid to the person appointed to receive it(*g*). But it seems that the direction so to pay the legacy ought to appear in the will itself, and not merely from extrinsic evidence(*h*). Trinkets specifically given to infants have been ordered to be delivered to their father by the executors(*i*).

Such payment is valid, where expressly directed by the will.

Trinkets bequeathed delivered to father.

The stat. 12 Car. 2, c. 24, empowers guardians(*k*) appointed under its provisions to take “the custody, tuition, and management of the goods, chattels, and personal estate” of their wards; but the remedies given by the statute are only co-extensive with those of guardians in socage, who seem not to have any

Payment to statutory guardian not practised.

(*e*) 3 Bro. C. C. 98.

(*h*) See 3 Bro. C. C. 97.

(*g*) *Fane v. Fane*, 1 Vern. 30; (*i*) *Hill v. Chapman*, 2 Bro. C. C. 612.

Cooper v. Thornton, 3 Bro. C. C.

96; *Robinson v. Tickell*, 8 Ves. 142.

(*k*) Sect. 9, *supra*, p. 82.

legal interest in the personal estate of their wards^(l); and the payment of legacies to the testamentary guardian has not been practised by executors.

Legacy should be paid into the Bank, and the infant petition at majority.

Provisions of stat. 36 Geo. 3, c. 52.

The safe and simple course is for the executor to pay such legacies into the Bank, at the time when he would, but for the infancy, pay them to the legatees; the legatees, when of age, may petition for the money, and it will be applicable in the mean time (if required) for their maintenance. This is the proper arrangement under the stat. 36 Geo. 3, c. 52, which enacts^(m), that “where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of the act, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant-general shall give his certificate as usual in such cases, on production of the certificate of the Commissioners of Stamps that the duty thereon has been duly paid; and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money, when paid in, shall be laid out

(l) *Supra*, p. 31.

(m) Sect. 32.

by the said accountant-general, without any formal request for that purpose, in the purchase of Three Pounds per Centum Consolidated Annuities, which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way⁽ⁿ⁾."

If a suit is instituted merely to secure legacies for infants, which might have been secured under the statute, the costs of the suit will not be allowed out of the general assets of the testator^(o).

Costs of suit for legacy not to be allowed out of assets of testator.

Where a legacy is given to an infant, payable *in futuro*, the Court, or the executor of his own authority, may lay out in the purchase of three per cent. stock a sum equal to the legacy, and this appropriation binds all parties, and the legatee must abide by the rise or fall in the value of the funds^(p).

Legacy to infant, payable *in futuro*—stock may be appropriated by executor, or by the Court.

But the appropriation must be made during the infancy of the legatee, or he will not be bound. Thus where it had been referred to the Master to compute how much stock it would be necessary to set apart to answer certain legacies to infants, and the Master made his report, but before any order was made on it, one of the infants came of age, and petitioned for his legacy; the price of stock had fallen in the mean time; so that the quantity of stock mentioned by the Master in his report was no longer sufficient to answer the legacy. Sir John Leach, V. C., said, that, if an order had been made during the infancy, it would have concluded the amount of the legacy; but that the determination of the infancy rendered the report nugatory *as to that particular legatee*, and that he

Legatee not bound, unless appropriation actually made during his infancy.

(n) See pp. 217, 218, *supra*.

C. C. 147; and see 7 Ves. 150;

(o) *Whopham v. Wingfield*, 4 Ves. 630.

Green v. Pigot, 1 Bro. C. C. 103; *Hutcheson v. Hammond*, 3 Bro.

(p) Ward on Legacies, p. 290; *Ex parte Champion*, cited 3 Bro. Dick. 578.

C. C. 158. *Contra, Alcock v. Eames*,

was entitled to so much stock as would be sufficient to answer the legacy at the time of the application(*q*).

Of course it is not to be inferred from the expressions of the learned Judge, that the Court would set apart for an infant a sum of stock which it knew to be, at the time of making the appropriation, insufficient to answer his legacy.

Legacy charged on land; infant not bound by appropriation.

If real estate is charged with a sum of money for an infant, payable at his majority, and *there is no direction to appropriate the money*; there, although the money be invested in the funds as a security for the payment of the legacy to the infant when he shall become entitled; yet, if the fund should eventually turn out insufficient for the payment of the infant's legacy, he may still have recourse to the estate for the deficiency, and even a Court of Equity, it seems, cannot bind his right(*r*).

Secus, if the time for raising the money has arrived.

But although the interests of infants are not to be subjected without necessity to any fluctuation, yet if the terms of any instrument by which land is charged with the payment of a sum of money to an infant *authorize the raising of the money*, the infant will be bound by an investment in the three per cents.

By a marriage settlement lands were charged with a certain sum of money, to be raised by sale or mortgage, and to vest at twenty-one or marriage, with a clause providing that no mortgage was to be made until some one of the portions should become payable. Four of the children were of age, and three under age. Sir L. Shadwell, V. C., was of opinion

(*q*) *Rock v. Hardman*, 4 Madd. 253. born, the purchaser is not bound to see to the application of the

(*r*) *Dickenson v. Dickenson*, 3 Bro. C. C. 19; see 3 Sugd. V. & P. 156, 10th ed. Where, however, there is a trust for the sale of real estate, and the time for sale has arrived, and the persons entitled to the money are infants or un-
born, because he would otherwise be implicated in a trust which might be of long duration, *Ibid.* *Sowarsky v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46; *Breedon v. Breedon*, 1 R. & My. 413.

that the whole sum had become raiseable, and must be raised at once. In answer to the argument, that some of the shares might become diminished in amount, his Honor observed, that the Court considers the investment in the Three per Cent. Consols as equivalent to payment. If there were any rise in the funds, the children under age would be entitled to the benefit of it(*s*).

Where a debt is due from a bankrupt to an infant, the guardian upon petition will be permitted to prove it under the commission, and, if this is not done, the certificate will bar the demand. A legacy in the hands of a bankrupt executor, vested, but subject to be divested in a certain event, falls within this rule(*t*).

Debt from bankrupt to infant may be proved by guardian; —effect of certificate.

A guardian or receiver, if he retains balances of money in his hands, must pay interest, though he has made none by it(*u*).

Guardian retaining balances pays interest.

(*s*) *Gillibrand v. Gould*, 5 Sim. 629, 487; *Hicks v. Hicks*, 3 Atk. 149. 273; *Raphael v. Boehm*, 11 Ves.

(*t*) *Walcut v. Hall*, 2 Bro. C. C. 92; S. C. 13 Ves. 407, 590; *Mosley v. Ward*, 11 Ves. 581; *Dornford*

(*u*) *Dawson v. Massey*, 1 Ba. & Be. 219, *supra*, 259. As to the manner in which interest is computed and charged, where guardians or trustees have failed to make the proper investment, see 2 Ves. *v. Dornford*, 12 Ves. 127; *Tebbs v. Carpenter*, 1 Madd. 290; *Carmichael v. Wilson*, 3 Molloy, 79; S. C. 4 Bl. N. S. 145; *Docker v. Somes*, 2 M. & C. 655.

CHAPTER XXV.

RULE PROHIBITING THE CONVERSION OF INFANT'S
PROPERTY.

The nature of
the property
must not be
changed.

IT has been laid down^(a) as a general rule, that the nature of an infant's property must not be changed, either by a guardian or trustee out of Court, or by the Court itself, so as to convert personal into real, or real into personal estate; and in treating of a subject which scarcely admits of any systematic arrangement, it may be convenient to classify, according as they are affected by this rule, some of the common operations in the management of infants' estates.

Reason of the
rule, as regards
conversion of
personal into
real estate.

The policy of the Courts in establishing the first branch of the prohibition, has been greatly influenced by the distinction which existed under the law of wills, as settled previous to the late statute, 1 Vict. c. 26, between the real and the personal property of infants. Of the latter, males were able to make a testamentary disposition at the age of fourteen, females at twelve^(b). Real estate, on the other hand, could not be devised by any person under the age of twenty-one. The investment of money in land might in many cases prove beneficial to an infant if he should live to attain his full age; but if he did not, it was, in the opinion of many judges, highly prejudicial to him; as substituting real estate, over which he had no power of disposition, for personal property, which he might bequeath by will at an early age, and thus unduly ad-

(a) *Ex parte Phillips*, 19 Ves. 122; *Ware v. Polhill*, 11 Ves. 278; *Pierson v. Shore*, 1 Atk. 480. (b) 1 Bl. Comm. 463; 2 Bl. Comm. 497; *Anon.*, Mosely, 5; see 2 Eden, 55.

vancing his heir, and hindering him from providing for his younger children, if he had any (c). The Court, however, where it appears that a change would be for the benefit of the infant, makes an order accordingly, even although there be no authority for such a measure in the will or other instrument under which he holds his property: but this permission, according to Lord Hardwicke (d), "is always granted with a *salvo*, that if the infant dies before twenty-one, or does not approve of the purchase when he comes of age, the property shall not alter;" or, to use the language of Sir Thomas Clarke, M. R., "the Court adds, but *so as not to alter* the nature of the property (e);" or the change is made, says Lord Eldon, "with this qualification, that, if he lives, he may take it as real estate; but without prejudice to his right over it during infancy as personal property (g)."

With what qualification change of investment is permitted.

This proviso by the Court does not create the right, but is a declaration of a pre-existing right so to have the property secured: and if an order is made without such a declaration, it is a matter of course to reform the order.

This rule may be considered in its application to the expenditure of an infant's money in the purchase of real estate, in the discharge of incumbrances, or in the execution of repairs or improvements, affecting the real estate which he already possesses.

(c) *Earl of Winchelsea v. Norcliffe*, 1 Vern. 437; *Pierson v. Shore*, 1 Atk. 480; *Ex parte Phillips*, 19 Ves. 122; see 2 Ves. jun. 264; Sugden on Wills, 6.

(d) 2 Atk. 413.

(e) Dick. 323.

(g) *Ex parte Phillips*, 19 Ves.

122.

SECTION I.

Conversion of Personality into Realty by Purchase of Real Estate.

IN a case where Lord Eldon sanctioned the purchase of real estate with an infant's money, the order which he is said to have made seems not to fall completely within the rule which has been stated.

A father left real estate^(h) to descend to his son, and made a residuary bequest of his personal estate to his executors, to be invested in real or government securities, and accumulated, (subject to his son's maintenance), and transferred to the son at twenty-one, with a gift over in case he should die under age. Lord Eldon, upon the petition of the infant at the age of eighteen, suggesting an investment in land adjacent to the lands which he had by descent, ordered that he should be at liberty to lay proposals before the Master for such investment; and directed that the land, when purchased, should be conveyed to a trustee, in trust for the infant, his executors and administrators, until he should attain the age of twenty-one, and afterwards for him and his heirs.

Proper form of declaration by Court where real estate is purchased.

Sir John Leach, V. C., in a similar case⁽ⁱ⁾, observed, that, in the event of the estate being purchased as proposed, it was proper to declare, generally, that it should be considered as personal estate, without saying until the infant should attain twenty-one, as at that period he might be a lunatic, and other inconveniences might arise. At twenty-one he might, if he pleased, consider it as real estate.

This order seems more correct than the former, as restricting the Court's interference within narrower limits; for there

^(h) *Ashburton v. Ashburton*, 6 Ves. 6.

⁽ⁱ⁾ *Webb v. Lord Shaftesbury*, 6 Madd. 100.

can be no reason for altering the nature of the property of an adult unless he wishes it himself. It is also in accordance with the expressions, already cited (*k*), of Lord Hardwicke, Sir T. Clarke, and Lord Eldon.

The Court is guided by these principles, not only in that which it actually does or allows to be done, but also in putting a construction upon what has been done without its authority.

S. P., where Court puts construction on what has been done.

The trustees (*l*) of an infant, having a sum of £3,000 in their hands, arising from the profits of his real estate, invested it with the consent of his grandmother, who was his guardian, in land which lay near his estate, and took the conveyance in their own names; but declared the trust to be for the benefit of the infant, in case he should, on coming of age, accept the land, and discharge them of the £3,000.

Purchase of lands by trustees, with election for infant at full age.

The infant died under age. It was observed that here was only a bare election in the infant in case he had lived to come of age; and the trustees were decreed to pay the £3000 to his administrator; but with interest only according to what they had made by the profits of the purchased lands: so that, to a certain extent, the purchase must have been considered as a proper act for the benefit of the infant (*m*).

An executor (*n*) being possessed, in trust for an infant, of a lease for ninety-nine years, determinable on three lives, one of which had already fallen in, took a new lease in the name of a trustee to him and his heirs for three lives, in trust for the infant and his heirs. It was alleged, but not fully proved, that the lessor had refused to make any more leases for years.

Renewal, for lives, of lease for years.

It was decided that this renewed lease, though for lives, should follow the nature of the original one, and go to the administrator of the infant as that should have done: and it was observed, that, if the lessor would not have made any other than a descendible lease for three lives, such lease ought to

(*k*) *Supra*, p. 279.

(*m*) See 1 Ves. jun. 456.

(*l*) *Earl of Winchelsea v. Norcliffe*, 1 Vern. 434.

(*n*) *Witter v. Witter*, 3 P. W. 99.

have been declared in trust for the benefit of the executors and administrators of the infant, if he should die during his infancy, and that though this trust was not declared, yet it was in equity implied.

Declaration of trust on renewal of lease.

Nor can the nature of the infant's interest be altered by any declaration of trust, but the declaration will be construed with reference to the interest he had before. Thus, where two leases for lives held in trust for an infant, one to the trustee and her heirs, the other to the trustee, her executors and administrators, were renewed by the infant's mother, who took the first to her and her heirs, and the second to her, her executors and administrators, and declared the trust for her son, simply; Lord *Eldon* was of opinion that the son must take the same interest he had previously, i. e. that the first lease must go to him and his heirs, the second to him and his executors (*o*).

Application of sum raised by subscription to rebuild infant's house.

An infant (*p*) was tenant in tail of a copyhold house; the house was burnt down; and a sum of money, less than the whole amount at which the loss by the fire was computed, was collected by subscription, and paid into the hands of his guardian towards the rebuilding; the tenant in tail died under age, without the money having been applied as intended. It was held to belong to the persons entitled in tail in remainder, subject to a deduction of the interest, during the infant's life, upon the whole amount of the loss: and this interest, as representing the rents and profits during his life, was to go to his personal representatives.

Where conversion has been supported; —against party concurring.

In one case, under peculiar circumstances, conversion by purchase was supported against one who had concurred in it.

A person (*q*) entered into articles upon his marriage, to settle his estate on himself for life, with remainder as to part to his wife for her jointure, with remainder as to the

(*o*) *Milner v. Lord Harewood*, 18 Ves. 259. See p. 274. (*q*) *Inwood v. Thynes*, Ambl. 417; 2 Ed. 148, S. C.

(*p*) *Rook v. Worth*, 1 Ves. 460.

whole to his first and other sons in tail male, with remainder to his own right heirs. He died without having executed a settlement, leaving a widow and an infant daughter, his heiress at law.

The widow conveyed her jointure lands to her creditors, upon trust for sale. Upon the petition of the infant and her uncle, (the mother signing the petition), a reference was made to the Master, who reported that it would be for the infant's benefit to purchase, and to have the purchase-money paid out of her personal estate. The purchase was so made; the trustees for sale conveyed their estate to a trustee, who soon after declared the trust of his conveyance for the infant. The infant lived to attain twenty-one, and gave a letter of attorney to receive the rents and profits of the estate. She died unmarried, about a year after coming of age, and the mother, as her administratrix, filed a bill for an account of the rents and profits of the jointure estate.

Lord *Northington* held, independently of the fact that the infant had attained twenty-one and exercised acts of ownership,—that the equitable jointure estate of the mother had been extinguished when the trust was declared in favour of the infant, who had the legal fee of the whole estate; that the infant's money having been converted into realty by the Court, with the concurrence of the family, for the benefit of the infant, her administratrix had no claim; and that if he were to declare for the latter, he would act contrary to her own petition, and contrary to the direction of the judge who made the order upon that petition. His Lordship also used expressions which seem to claim for the Court the power of making an absolute and unqualified conversion of an infant's property; but it has been already seen that the best authorities do not sanction this view: and from the stress laid, in the case just stated, on the mother's concurrence, it seems highly probable that the decision would have been different, if the infant had died under age, and had bequeathed her personal estate to a stranger.

Where supported against husband of infant.

Trustees having bought land contiguous to the infant's, at the instance of her nearest relatives;—on a bill for an account by the infant and her husband, who had made no settlement on her marriage, and had exercised acts of ownership upon the land; the Court refused to set aside the purchase, which it considered an honest and advantageous purchase; or to declare that the land was to be regarded as personalty till the infant should come of age (*r*).

To secure for infant the benefit of a condition.

The Court has also sanctioned the conversion of personalty into realty, in order to secure for an infant the benefit of a condition.

In the case of *Vernon v. Vernon* (*s*), an estate was given to an infant on condition of paying as much from his personalty as had been paid for the purchase of the estate. The trustees applied the personalty according to the condition; and Lord *Thurlow* thought that the personal representative had no right to call it back; as the change was not made wantonly, though without order; but was for the benefit of the infant in pursuance of a condition, by which he was to hold beneficial property, which he could not otherwise have had (*t*).

(*r*) *Terry v. Terry*, Gilb. Eq. R. 10; Prec. Cha. 273.

(*s*) Cited in argument, in *Ex parte Bromfield*, 1 Ves. jun. 453; 3 Bro. C. C. 510.

(*t*) The case of *Kirk v. Webb*, 2 Freem. 229; Prec. Cha. 84; 2 Eq. Ab. 743, may, at first sight, seem to be a case in which conversion was supported; but, upon examination of the reports, it appears that

the question there was, whether the money of the infant, which had been improperly invested by the guardian in the purchase of land *for himself*, could be followed into that land by the infant's administrator, as against the *heir of the guardian*. The decision was in the negative, but has been overruled. See *Lane v. Dighton*, Amb. 409; *Lench v. Lench*, 10 Ves. 516.

SECTION II.

Conversion by Discharge of Incumbrances on Land, generally.

WHERE there are incumbrances on an infant's real estate, trustees and guardians must keep down the interest out of the rents and profits, and they cannot, generally speaking, invest his personal estate more usefully than in discharging those incumbrances. If it becomes necessary to institute a suit in equity for the management of the infant's property, it will be referred to the Master to inquire into the incumbrances, to state their priorities, and to take an account of what is due upon them. When a mortgage debt has been reported due, (and not before), the receiver of the estate will be ordered to keep down the interest. If the infant has money outstanding, a reference may be obtained, to inquire whether it will be for his benefit that the money should be laid out in the purchase of any existing charge on his real estate (u).

The rule which forbids the conversion of the property of infants, has a direct bearing upon the discharge of incumbrances to which their lands may be subject.

In an old case (v), indeed, it is made a question whether the Court will decree satisfaction of a bond debt of the ancestor out of the profits of the real estate during the minority of the heir, where there is a deficiency of assets.

In another old case (x) it is laid down that where an estate descends to an infant subject to incumbrances, the guardian may, without the direction of the Court, pay the interest of any real incumbrance, and the principal of a mortgage, because that is a direct and immediate charge upon the land; but not

Guardians ought to pay interest on incumbrances,

and may discharge the principal.

Reference as to incumbrances in a suit.

Receiver not ordered to pay interest till debt reported due.

Reference as to investing infant's money on mortgage of his real estate.

Rule as to conversion, applied to incumbrances on infant's land.

Progress of the doctrine.

The rule against conversion formerly held not to apply.

(u) *Supra*, p. 270.

(x) *Palmer v. Danby*, Pre. Cha.

(v) *March v. Bennett*, 1 Vern. 137; *S. C.* 1 Eq. Ab. 261.

the principal of any other real incumbrance; and that the profits so applied by the guardian, are not to be accounted personal estate, so as to entitle the administrator of the infant to them, if the infant should die during his minority.

The guardian of an infant paid off, with money which belonged in part to the infant, a mortgage affecting the infant's estate, and took an assignment of the mortgage. The infant died under age, and the lands in mortgage descended to his heir at law, who filed a bill to redeem. The guardian insisted that he had paid off the mortgage with his own money, and that for what money he had of the infant's, he was accountable only to the infant's personal representative, (who was his own daughter). But the Master of the Rolls declared that the guardian ought to employ the estate of the infant, as far as it would go, to pay his debts; and decreed an account, and that the heir should be at liberty to redeem on repayment of the money which the guardian had paid in discharge of the mortgage, deducting so much as was proved to have been the infant's money(*y*).

And again we find, that where a mother, as guardian(*z*) to her infant son, out of his personal estate paid off a mortgage; the infant afterwards died, and the estate descended to a remote heir; and then the mother would have had back the money, but the Court denied any relief.

General expressions are also to be met with, to the effect that incumbrances will be ordered to be discharged out of the infant's money(*a*).

The rule applied, where the guardian had kept the incumbrance on foot for the heir.

But in another case a mother(*b*), as guardian to her son, to whom lands had descended from her late husband, received the rents and profits of his estate, and paid off specialty debts

(*y*) *Dennis v. Badd*, 1 Cha. Ca. 417; 2 Ed. 148; *S. C. Es parte Grimstone*, Ambl. 708; *Es parte* 166.

(*z*) *Zoach v. Lloyd*, cited 2 Vern. 193. *Degge*, 4 Bro. C. C. 238, ed. Belt.

(*b*) *Waters v. Ebrall*, 2 Vern.

(*a*) See *Inwood v. Twyne*, Ambl. 606.

of the husband; but took assignments of the bonds. The son died under age, and the mother, as his administratrix, was decreed to stand in the place of the obligee, to receive satisfaction out of the real estate in the hands of the heir; after deducting what she had received out of her husband's personal estate, or the rents and profits of the real estate, during the infancy of her son, and after allowing for the son's maintenance.

Lord Hardwicke observed, in the case of *Seys v. Price*(c), that where an infant is entitled to personal estate, and also to a real one which is encumbered with debts and mortgages, the Court will direct the personalty to go in discharge of the incumbrances, yet it will not order the mortgages to be assigned to attend the inheritance, but still to be considered distinct, as personal estate, for the benefit of the infant.

But now settled
that the rule
applies.

Sir Thomas Clarke, M. R., gives the following account of the practice in his time(d). "See how it is almost daily in this Court as to personalty. If an estate descends to an infant in mortgage, and, out of savings, application is made to pay off the mortgage, the Court adds, *but so as not to alter* the nature of the property, whereby his personal representative might be affected."

Lord Thurlow, too, is reported(e) to have said, that he had observed that where a charge is paid off, or a mortgage redeemed, with an infant's personal property, it is ordered, that it be considered as personal estate, for the benefit of the infant. And Lord Eldon supposing the case of an estate charged with debts, the first taker an infant, and out of his estate all the debts paid; improvidently in this respect, that the creditors had cancelled all their securities; observed that the court

(c) 9 Mod. 221. See *Norbury v. Bro.* C. C. 516. See *Thomas v. Norbury*, 4 Madd. 191. *Kamish*, 2 Vern. 348; *Lord Comp-*

(d) *Tullis v. Tullis*, Dick. 323. *ton v. Oxenden*, 2 Ves. jun. 264;

(e) In *Ex parte Bromfield*, 3 *Forbes v. Moffatt*, 18 Ves. 393.

must, by an equity, have given the infant's personal estate a charge against the real estate, as nearly as it could have done if he had taken an assignment of the securities (*g*). There is also an express decision to the same effect by the M. R. in Ireland (*h*).

Applies to redemption of land-tax.

In the case (*i*) which gave rise to the observation of Lord Eldon which has just been cited, part of the personal estate of an infant tenant in tail had been applied in the redemption of the land-tax by persons not having authority within the statute (*k*), and they had not declared an option, in terms of the act, to keep up the charge as against the land for the infant's benefit. The infant died, and Lord Eldon decreed that his personal representative should charge the estate in the possession of the remaindermen; exactly as if the redemption had been effected, and an option declared by persons duly authorized.

Lord Eldon declared at the same time, that the Court, if an application had been made to it, never would have authorized a guardian to contract for the land-tax without directing him to make such an option as should preserve for the personal representative of the tenant in tail, if he died an infant, the benefit of the money applied in the purchase of the land-tax; and that the Court itself would have been so strongly bound by its rules as to not altering the nature of the property of the infant, that it would not have permitted the purchase, if that could not be arranged.

Statutory provisions for redemption of the land-tax on infant's estates.

It may be proper here to state the leading statutory provisions for the redemption of the land tax, so far as infants are concerned. The clause for declaring an option, spoken of

(*g*) 11 Ves. 283. See 2 Ves. jun. 264; 2 Ed. 164.

(*k*) *Dowling v. Belton*, 1 Flan. & Kel. 462.

(*i*) *Ware v. Polhill*, 11 Ves. 257.

(*k*) 38 Geo. 3, c. 60. This and the statutes 38 Geo. 3, cc. 6, 21, 40, 43, 108; 39 & 40 Geo. 3, c. 30; 41 Geo. 3, c. 72; were consolidated and amended by stat. 42 Geo. 3, c. 116.

by Lord Eldon, has not been retained in the statute now in force, but the general rules applicable to the discharge of incumbrances on an infant's real estate, must here have their full operation.

The stat. 42 Geo. 3, c. 116, by which the previous Land Tax Acts are consolidated and amended, empowers^(l) guardians and all persons having authority to act for infants, to contract and agree on behalf of such infants for the redemption of any land tax by the statute itself, or the 38 Geo. 3, c. 60, made redeemable, which such infants could or might have redeemed by virtue of the statute itself, if they had not been under any incapacity.

Guardians &c. may contract on behalf of infants for redemption of tax ;

Guardians of infants, and executors, administrators, or trustees seised or possessed of any manors, messuages, lands, tenements, or hereditaments in trust, and having authority to act for infants or issue unborn, may^(m), on the behalf of such infants or issue unborn, and under the restrictions and regulations contained in the statute, mortgage and convey or grant any rent-charge out of any manors, &c., belonging to or limited or settled to the use or for the benefit of any such infants or issue unborn, which such infants or issue unborn (if *in esse*) could or might have sold, mortgaged, or charged with any rent-charge for the purpose of redeeming any land-tax in respect of their estate or interest therein, either by virtue of the statute itself or otherwise, if they had not been under incapacity, and in the same manner as the infants &c. might themselves have done.

and may charge infant's estate for that purpose.

It is also made⁽ⁿ⁾ lawful for guardians of infants, who have contracted or who shall contract on their behalf for the redemption of land-tax charged on any manors, &c., wherein such infants shall be interested, to transfer to the commissioners for the reduction of the national debt, so much of £3 per cent. Consolidated or Reduced Annuities, which shall be standing in

May transfer to commissioners stock belonging to infants.

(l) Sect. 14.

(m) Sect. 53.

(n) Sect. 128.

the name or names of such infants either solely or jointly with such guardians, &c., or any of them, as shall be sufficient for the redemption of the land-tax contracted for; and the Bank is authorized to permit such transfers, and to give receipts.

May fulfil contracts by deceased ancestor of infant,

By another section (o) it is provided, that if any person who has entered into a contract for the redemption or purchase of any land-tax, dies without completing his contract, or making provision by will for its completion, his assets shall be liable to make good the contract, and his executors or administrators, and the trustees, guardians, &c. of any infant, or other person entitled to his estate and effects, shall be indemnified against such infant and all other persons whomsoever for making good the instalments necessary to complete the contract;—and also that if the person so dying had not the absolute estate or interest in the manors, &c.; and the guardians of an infant having the next immediate beneficial estate or interest in succession, reversion, remainder, or expectancy, and which shall have become vested in possession, by reason of the determination of the preceding estate or interest of the person so dying, shall be desirous of taking an assignment of such contract, in order to complete the same; the executors or administrators of the person so dying may sell and assign such contract to such guardians, on behalf of the infant(p).

and purchase benefit of contract.

(o) Sect. 166.

& J. 286; S. C. 2 Dow. & CL

(p) See *Hicks v. Morant*, 3 Yo. 414.

SECTION III.

Liability of Infant Tenant in Tail to keep down Interest of Incumbrances.

As to the liability of an infant tenant in tail to keep down the interest of incumbrances, there seems to have been some conflict of authorities.

In the case of *Chaplin v. Chaplin* (r), a man made a mortgage for years, and then entailed the mortgaged estate on himself and the heirs male of his body, with remainder over, and died, leaving issue one infant son, in whose time the interest was suffered to remain unpaid, and who died when he was about to come of age.

Decision by Lord Talbot, that infant tenant in tail need not keep down interest of mortgage.

Lord Talbot observed that, on account of the power which a tenant in tail has over the estate, there was no precedent of a tenant in tail being obliged to keep down the interest on a mortgage; and his Lordship refused to make any order upon the executors of the tenant in tail, to pay any arrears of interest, though it appeared that there was near twenty years' interest due, and though, in this case, the tenant in tail died before it was in his power to have barred the remainder by a recovery.

In the case of *Sergison v. Sealey* (s), an infant was tenant in tail of lands, subject to a charge of £2000. He died under age, and after his death an account was directed of the rents and profits of his lands, and the amount was directed to be applied towards keeping down the interest which had accrued during his life; and so much of the interest as the rents and profits would not discharge, was directed to be raised by sale or mortgage of the estate.

Decision by Lord Hardwicke, that he must,—

But Lord Hardwicke overruled a claim which was set up but only out of

(r) 3 P. W. 234.

(s) 2 Atk. 412.

rents and profits, and not out of personal estate.

In what case not forced to keep down interest.

Tenant in tail need not keep down interest.

Unless he be an infant.

on the part of the heir at law, to have the interest paid out of the personal estate. His Lordship remarked, that if there had been an application to the Court in the infant's lifetime, by his guardian, the Court would have directed the interest of the £2000 to be kept down out of the rents and profits of his estate, and not out of his personal estate. That if an infant tenant in tail, remainder in fee, had nothing to support him but the rents and profits of real estate, and would starve if they were applied to keep down interest, he should not, in that case, have directed them to be so applied; but here, there was a large personal estate, besides the rents and profits of the real estate, which made the difference.

Lord Hardwicke afterwards stated the law on this subject more fully in the case of *Amesbury v. Brown* (t).—"In general, a court of equity endeavours to make every part of the ownership of an estate bear part of the incumbrance; as, if there is tenant for years or life subject to a mortgage, they must keep down the interest during that time. But there is a particular estate called an estate tail, which is distinguishable; and therefore it is true, that in general cases, if there is tenant in tail, remainder over, subject to a preceding mortgage, or incumbrance, and tenant in tail is in possession and receipt of the rents and profits, the mortgage in hands of mortgagee, and he lets the interest run in arrear without applying to keep it down; neither the issue in tail nor the remainder-man can come against that tenant in tail, to compel the keeping down the interest, nor against the representative of tenant in tail after his death, to compel the indemnifying and discharging the remainder from that arrear of interest incurred during possession of tenant in tail, and his receipt of the profits, unless in that single instance, which was the case of an infant, of *Serjison v. Cruise*. *Chaplin v. Chaplin* is said to be determined differently from it, but I do not know whether they

agree in circumstances, which may make a great difference. I went on the general rule, that the act of a guardian or trustee of an infant shall not alter his property, or that of those coming after him. Where there is tenant in tail of full age, courts of law, as well as equity, consider the reversioner or remainder-man, as in the power of that tenant in tail. But the case of an infant tenant in tail is different, as he cannot bar the remainder, unless under the King's Privy Seal (u); a method which is never granted voluntarily to change the rights of the parties but in case of some family settlements."

The reason.

The distinction in this respect between infant and adult tenants in tail, is expressly recognised by Lord Eldon (v).

In a modern case (x), Sir Thomas Plumer, M. R., remarked, that although the remainder-man has no equity against an adult tenant in tail, because the latter can make the estate his own, an infant tenant in tail cannot be put upon the same footing, since he cannot make the estate his own. He then proceeded to consider the contradictory cases of *Chaplin v. Chaplin*, and *Sergison v. Sealey*, and after observing that in the former case the expressions of Lord Talbot are general, and that he does not advert to the distinction between adults and infants, tenants in tail, and also observing, that *Sergison v. Sealey* had always been considered a leading case on the subject, and as forming the rule upon which the Court was to proceed; his Honor said, that it appeared from the expressions of Lord Hardwicke, in *Amesbury v. Brown*, that he did not think that his own decision in *Sergison v. Craise* (which is the same case as *Sergison v. Sealey*), was at variance with Lord Talbot's, in *Chaplin v. Chaplin*. He also said, that in *Jones v. Morgan* (y), the general doctrine, as laid down by Lord Hardwicke, was recognised by Lord Thurlow,

Review of the cases by Sir T. Plumer.

(u) See *Burges v. Mawbey*, Turn. & Russ. 175. (x) *Burges v. Mawbey*. (y) 1 Bro. C. C. 206.

(v) 11 Ves. 275, 278.

and that in *Ware v. Polhill*(z), Lord Eldon stated the rule in the same way. His Honor continued as follows:—

“Under this review of the subject, the case of *Sergison v. Sealey* has not been shaken, and therefore must govern this. Lord Hardwicke, in adverting to the case of *Chaplin v. Chaplin*, said there might be a difference of circumstances; I think there is, though a very slight one. The infant tenant in tail, having suffered the interest to fall into arrear, died just before he came of age, leaving personal estate; and Lord Talbot was asked to order the executors to pay the arrears out of the personal estate. Lord Talbot refused to do it. And in *Sergison v. Sealey*, Lord Hardwicke said, that the interest should not be paid out of the personal estate, but that the rents and profits were the fund out of which the guardian should have paid the interest. If that does not reconcile these two cases, I think the point is decided by *Sergison v. Sealey*.”

It was decided accordingly, in the principal case, that the mother and guardian of an infant tenant in tail ought to have applied the rents and profits in keeping down the interest of the debts charged upon the estate.

The obligation to keep down interest can only be enforced by reversioner or remainder-man.

It is only by a reversioner or remainder-man that the obligation on an infant tenant in tail to keep down the interest of incumbrances out of the rents and profits of the estate, can be enforced.

Where(a) the interest on a mortgage was suffered to accumulate during the infancy of a tenant in tail, and the tenant in tail came of age, and suffered a recovery, and resettled the estate; it was held, that his real and his personal representatives had no equity against each other to vary the state of things as it existed at his death.

Order on receiver to keep down interest does not amount to appropriation.

In this case, on a bill by the infant tenant in tail, a receiver had been appointed, with an order to keep down the interest

(z) 11 Ves. 257.

(a) *Bertie v. Lord Abingdon*, 3 Mer. 560.

of incumbrances out of the rents: but the receiver did not in fact keep down the interest of the mortgage in question, but paid the rents into Court to the credit of the cause. It did not appear to the Court, that the order so made upon the receiver amounted to an appropriation of the rents and profits, so as to affect the interests of the real and personal representatives.

The mortgage-money, however, had belonged in part to the infant tenant in tail himself; and so much of the rents and profits so paid into Court, as was equal to the interest of his share of the mortgage-money, was held to have been applied in discharge of that interest.

SECTION IV.

Conversion by Expenditure in Repairs and Improvements.

THE Court has always been in the habit (a) of ordering repairs to be made, and houses and gardens to be kept up, with the money of infant proprietors, without creating a charge upon the real estate for the amount so expended; and this is no more than trustees and guardians ought to do where the judicial authority is not resorted to. Where there is a suit pending, the receiver must carefully apply for the sanction of the Court to all repairs and improvements; and a reference will always be made on this subject, upon which a proper estimate must be laid before the Master, and if it is exceeded, a fresh reference must be obtained as to the necessity of the additional expenditure. So any expenditure which turns out to be advantageous for the infants, by improvements tending to make the estate productive, and to increase its value, will always be protected by the Court, and will fall within the

Houses and gardens kept up out of personality.

Reference as to repairs.

Advantageous expenditure in improvements protected, though not authorized by any instrument.

(a) See *Ex parte Grimstone*, C. C. 255, n., ed. Belt.; *In re Red-Ambl.* 708; *Ex parte Degge*, 4 Bro. dington, 1 Molloy, 256.

terms of a reference to the Master, to inquire what monies have been properly expended, though the instrument under which the infant is entitled may contain no clause authorizing such an outlay (*b*). The Court also frequently gives a prospective sanction to the application of large sums in extensive improvements. But considering how strongly the rule against unconditional conversion has been stated (*c*), it would be difficult, if the point were urged, to avoid charging the real estate with the amount; for though the Court might refuse to hear the next of kin, it would still, under the rule already mentioned, deem it beneficial for the infant to prevent the conversion of his personalty into real estate.

Improvements ordered by Court.

Whether real estate charged, query?

Act for the drainage of settled estates.

Guardians may petition for leave to improve by draining.

Petition served on remainder-man.

Lands charged with money expended;

Facilities have lately been afforded for an important class of improvements, by the act for the drainage of settled estates.

By stat. 3 & 4 Vict. c. 55, the guardians of any infant tenant for life, or for a term determinable on his or her life, under any will, settlement, or other like disposition, entitled in possession at law or in equity to any lands in England or Ireland, are empowered (*d*) to apply by petition to the Court of Chancery (*e*) in England, or to the Court of Chancery or Exchequer in Ireland, for leave to make permanent improvements by draining; the improvements and the cost, &c., to be specified in the petition; the petition to be referred to a Master, and the Court to make order on his report.

A copy of the petition is to be served (*g*) on the remainder-man, or in case of his infancy, upon such person as the Court shall appoint; the remainder-man &c. to have liberty to attend under the reference, and to consent or object; the costs to be paid by the petitioner.

After the improvements have been made, the Master

(*b*) *Supra*, p. 213; *Umbleby v. Kirk*, 1 C. P. Cooper, 254.

(*c*) Pages 278, 279, *supra*; see *In re Badcock*, a lunatic, 4 My. & C. 440.

(*d*) Sect. 1.

(*e*) Or Exchequer; but see 5 Vict. c. 55.

(*g*) 3 & 4 Vict. c. 55, s. 2.

may (*h*), by certificate, on having satisfaction that the money has been properly expended, authorize the guardians to charge the lands drained, or any other lands subject to the like uses or trusts, with the payment of the money expended and interest; the principal to be paid off by equal yearly instalments, not less than twelve in number, nor more than eighteen.

to be paid off
by instalments.

SECTION V.

Conversion of Realty into Personality.

THE principle to which the rule prohibiting the conversion of personality into real estate has been referred, the advantage to the infant of retaining his testamentary power could never have had any influence in preventing the conversion of real estate into personality; yet the prohibition has been extended to this latter species of conversion also (*i*), and the statement of the rule against conversion in general is to be found in connexion with reasons supporting only the former branch of the prohibition (*h*).

General prohibition.

In making the prohibition general, it has not been the object of the Court to shew favour to one class of the infant's representatives more than another; but it seems to have been considered advantageous for the infant, that his property should in general be maintained in the same shape in which it devolved upon him; and as an infant is by law incapable of making an absolute disposition of his inheritance by any conveyance (*l*), the Court could only exercise its discretion with regard to conversion of a less important kind than the entire alienation of the estate.

(*h*) s. 4.

(*h*) 19 Ves. 122.

(*i*) 1 Ves. jun. 463; 2 Ves. jun.

(*l*) 3 Atk. 712.

73; 11 Ves. 278.

Conversion of
realty into per-
sonalty by fel-
ling timber.

One of the ways in which real property is liable to be converted into personal property is the felling of timber.

Where the
guardian ought
to fell in due
course.

Where an infant is in possession of land for an estate in fee-simple, or in tail, or as tenant for life without impeachment of waste, so that he would have, if of full age, the right of cutting timber; in such a case, if the produce of the timber on the estate is part of the general rental, it is the duty of the guardian to continue the usual management of the estate, and that which is suited to its circumstances (*m*): or the Court will itself authorize the cutting of all timber which is fit and proper to be felled in a due course of management (*n*): and the money arising from the sale of the timber belongs, in either case, to the personal estate.

The produce
personalty.

Remainder-
man cannot ob-
tain injunction
against felling
by guardian of
tenant in tail.

An infant tenant in tail has, as against the remainder-man, the same rights as one of full age; and even if his guardian cuts down the whole of the timber on the estate, an injunction will not be granted on the application of the remainder-man. Thus, an infant (*o*), tenant in tail in possession, being in a very bad state of health, and not likely to live to full age, cut down by his guardian a quantity of timber, just before his death, to a very great value: the remainder-man applied for an injunction to restrain him, but could not obtain it.

But it must be
for benefit of
infant.

But Lord Hardwicke has remarked (*p*), that if this were done in such a way as to be to the prejudice of the infant himself, on application of the infant, the Court will judge what is for his benefit; and it may be presumed, that in judging what was for his benefit, the Court could not, under any state of the law of wills, have been induced to permit a wasteful and destructive felling of timber, by which his estate would be permanently injured, and he himself impoverished, if he should recover his health.

S. P. applies to
opening a mine.

Upon the principle which governed the case just stated,

(*m*) See 2 Ves. jun. 71.

(*o*) *Saville v. Saville*, cited Ca.

(*n*) *Hussey v. Hussey*, 5 Madd. temp. Talb. 16; 1 Ves. 548.
44.

(*p*) 1 Ves. 548.

as well as on the ground that opening a mine is a benefit to the whole kingdom, Lord Hardwicke afterwards held (*q*), that the guardian of an infant tenant in tail had a right to open a mine, and that the remainder-man must not interfere with coals dug during the life of the infant. The guardian, he added, is solely accountable for his management to the infant at full age, or to any one who stands in his place.

If timber is severed from an estate by the act of a trespasser or by a tempest, the timber belongs either to the person who represents the inheritance as being tenant for life without impeachment of waste, or, if there be no such tenant for life, to the person who has the inheritance (*r*).

Who has timber severed by trespasser or tempest.

But where the person who would, according to the common rules, profit by the trespass, is himself the trespasser, he will not be allowed to derive any advantage from his own wrong.

Trespasser himself not to profit.

An infant was seised in fee (*s*) of lands worth 40*l.* a year, and his mother, who was his guardian, cut down without authority timber of the value of 1000*l.*, and received the money. The infant died, and on a bill filed by the heir-at-law, who was also an infant, it was declared that the timber cut down should be considered as real estate; an account was directed against the mother; it was ordered, that what was found due should be paid into Court for the benefit of the plaintiff, and, in case of his death before twenty-one, the money was to be considered, and to go in course of succession as his real estate (*t*).

The point decided in this case is, according to Sir L. Shadwell, V. C. (*u*), that no person who commits a trespass shall by his own wrong have any benefit of the timber cut. Upon

(*q*) *Lyddal v. Clavering*, Ambl. 371, n., ed. Blunt; *Clavering v. Clavering*, S. C., Moa. 219. (*s*) *Tulkitt v. Tulkitt*, Ambl. 370, and notes, ed. Blunt; S. C. Dick. 322.

(*r*) *Lewis Bowles's case*, 11 Rep. 79; see *Tooker v. Annesley*, 5 Sim. 240. (*t*) 1 Ves. jun. 453.

(*u*) 5 Sim. 241.

a similar principle, where (v) committees of a lunatic, who were themselves entitled to the reversion of his real estate, bought timber for repairs with his money instead of taking it off the estate; Lord Hardwicke was of opinion that committees might exercise the same power as to cutting timber for repairs as any discreet owner might do, and as the committees had acted merely with regard to their own interest, they were ordered to make good to the personal estate the money which they laid out in timber.

Alleged distinction between tenant in tail, and in fee.

In the case of *Tullit v. Tullit*, however, as reported by Ambler, a distinction was taken in argument between the cases of an infant tenant in tail, and an infant tenant in fee; and it was said to be clearly for the benefit of the infant to cut down the timber in the former case, and that the money could not be considered otherwise than the infant's personal estate; for if so, it must go to the remainder-man, and be lost to the infant's family.

We also learn from Ambler, that, on the same occasion, "Mr. Capper, as *amicus curiæ*, mentioned the following case of *Mason v. Mason*, in 1724, before the Lords Commissioners, where the distinction was made by the Court between the case where the infant was seised in fee, and where he was seised in tail. Sir Robert Walpole having occasion for timber to build Houghton Hall, contracted with the mother (x) of an infant, who was tenant in fee, for timber to the value of £1000. After part was cut down, application was made to the Court for an injunction; upon which it was referred to a Master; who approved the cutting down to the whole value contracted for; and accordingly, leave was granted; and it was ordered, that the money to arise by the sale, should be considered as part of the infant's real estate, and to go to his heir-at-law."

And Ambler further states, that Sir Thomas Clarke, M. R.,

(v) *Ex parte Ludlow*, 2 Atk. 407.

(x) *Mason v. Mason*, Ambl. 371, n. 2, ed. Blunt.

in *Tullit v. Tullit*, "allowed the distinction as taken in *Mason v. Mason*."

But the judgment of Sir Thomas Clarke, in *Tullit v. Tullit*, as reported by Dickens (*y*), does not notice the case of *Mason v. Mason*, nor the distinction supposed to have been there taken; and the language ascribed to the learned judge, strongly supports the opinion of Sir Launcelot Shadwell. The case of *Mason v. Mason* seems fairly open to the observations made upon it in argument in *ex parte Bromfield* (*z*). "In that case, the Court proceeded to execute the contract; and acted inconsistently with what was done in other cases, if they ordered it to be cut for the benefit of the infant, and at the same time to be considered as real estate; and if it was considered as a wanton change, and therefore, as not changing the rights of the representative, it was wrong to proceed any farther. Either way, that case is bad (*a*)."

It may therefore be fairly laid down, that the true principle of the case of *Tullit v. Tullit*, is as stated by Sir L. Shadwell: and that the Court will not interfere unless there be something which may be considered fraudulent management.

The distinction suggested between the cases of tenant in fee and tenant in tail, does not seem well founded. It is admitted that both have the same powers when of full age, and it seems to follow that the guardians of both in infancy should have the same powers. The remainder-man in tail is as much entitled to favour as the heir-at-law, and is at least equally likely to be a near relative of the infant; so that the loss to the infant's family will not be greater in one case, than in the other.

The distinction
ill founded.

In a case (*b*) where, after the death of a lunatic, his heir-at-law petitioned for money arising from the sale of timber,

(*y*) Dick. 322.

by a *dictum* of Lord Hardwicke, 2

(*z*) 1 Ves. jun. 457.

Ves. 384.

(*a*) There follow some observations upon a supposed recognition of the case of *Mason v. Mason*,

(*b*) *Ex parte Bromfield*, 1 Ves. jun. 453.

Opinion of Lord Thurlow;—where the Court will bring back the purchase-money of timber for the heir.

which had been cut under an order of the Court, Lord Thurlow expressed himself as follows:—"When once I consider this money as part of the lunatic's personal estate, I cannot reason it out of that case, but upon the supposition of an equity for the heir to recall the legal situation of the assets of the lunatic, and to apply them to his use; and I conceive that to be difficult; and that the case does not warrant me in doing it upon other grounds than this; that where a committee or guardian is entrusted with the care of an estate, and has abused that trust with a view of changing the quality of the estate to serve his own interest, there arises an equity to undo the act, tortious in that way. But I know no rule of equity upon a less ground than that. Perhaps the Court, where guardians or committees have, without order, taken upon themselves to change the property, will, particularly where there is a cause in Court, consider it as a matter of fraudulent management; for that is the ground upon which the Court must proceed. I think, I remember an application once, where timber had been cut down by a stranger tortiously; and it was insisted, that by equity it ought to be restored to the estate, and it was refused, as there was no abuse of confidence; but it was the tort of a stranger, and, being so, it was held that there was no equity upon the subject; and I think the law now is, that if timber was cut down so, it would be like the case of windfalls, and ought not to be restored by equity. Considering it so, it is impossible, where the Court, (taking those precautions it always does and ought to take, not to do it idly or unnecessarily, but for the benefit of the lunatic or infant), thinks proper to cut timber, and convert it, to conceive an equity to change the condition of that, when become personal property, and to replace it for the heir; as it is truly said, that being done for the benefit of the infant, it becomes indifferent, whether it is to be for the heir or personal representative afterwards, and it cannot be recalled in either case."

Where (c) a person is in receipt of the rents and profits only for an infant, that infant having no certain right to the estate, but there being a contingent devise over, such a guardian or trustee may not cut down timber of his own authority, though it may be fit for cutting, or the cutting may be beneficial; and, although such an act may not amount to waste, he will still be enjoined.

Where guardian must not cut timber.

Where a father was tenant for life (not without impeachment of waste), with remainder to his infant son in tail, the Court, agreeably to the prayer of a bill filed by the father and son as co-plaintiffs, authorized the cutting of timber which was decaying, and ordered the money to be secured, and paid to the infant when he should come of age (d). But the rule is, that the money shall be laid out in land to be settled to the same uses; and that the tenant for life shall be entitled to the interest of the fund in the mean time (e). The Court, however, where there is tenant for life impeachable of waste, and an infant remainder-man, can only authorize the cutting of such timber as is decaying, or which it is beneficial to cut, by reason that it injures the growth of other trees (g).

Disposal of money where there is tenant for life not S. W., and infant remainder-man.

What sort of timber will be allowed to be cut.

SECTION VI.

Guardian cannot elect for Infant to change the Nature of his Property.

WHERE money is given by will, or directed by a private act of Parliament, or otherwise, to be laid out in land, and the person entitled to it is an infant, the guardian is not

Guardian cannot elect for infant to change nature of his property.

(c) *Knight v. Duplessis*, 2 Ves. C. C. 76; *Delapole v. Delapole*, 17 Ves. 150; *Tooker v. Annesley*, 5

(d) *Bewick v. Whitfield*, 3 P. Sim. 235.

W. 266, and notes, ed. Cox.

(g) *Hussey v. Hussey*, 5 Madd.

(e) *Mildmay v. Mildmay*, 4 Bro. 44.

capable of electing to take it as money, any more than the infant himself; and it would not, even before the late statute (*h*), which took away from infants the power of testamentary disposition, have passed by the will of the latter (*i*).

So, where real estate had been converted into personal out and out, under a trust to sell for the payment of debts, and to pay the residue to the grantor, his executors, &c., and fell, thus impressed with the character of money, to a person who died an infant, and, therefore, incompetent to elect to have it reconverted, it was held, that the property passed, as personality, to the administratrix of the infant (*k*).

SECTION VII.

Where Guardians might change the Order of Succession, but not the Nature of the Property.

Where acts changing the order of succession, but not the nature of the property, have been sanctioned.

Acts by trustees or guardians, which had the effect of changing the order of succession to an infant's property, have received the sanction of the Court, where they were really advantageous to the infant, left the nature of the property unaltered so far as concerned his powers of disposition, and had been done simply and in good faith for his benefit, and not capriciously, or from partiality towards either class of representatives. And the Court, which has the same power as a trustee or guardian, has itself directed such acts.

A feme (*l*) purchased a church lease to her and her heirs for three lives, and died, leaving an infant daughter; two of

(*h*) 1 Vict. c. 26.

(*k*) *Van v. Barnett*, 19 Ves. 102.

(*i*) *Seeley v. Jago*, 1 P. W. 389;

(*l*) *Mason v. Day*, Prec. Chan.

1 Ves. 461; *Earlom v. Saunders*, 319; S. C. Eq. Ab. 494, pl. 7;

Ambl. 241; *Carr v. Ellison*, 2 Bro. S. C. Gilb. Eq. R. 77.

C. C. 56; S. C. Dick. 796.

the lives fell in; the infant's guardian renewed the lease; and it was held that this was a new acquisition, and should go to the heirs on the part of the father.

A., who had a bishop's lease (*m*) to her and her heirs, during three lives, devised it to her infant daughter, and directed the guardian and trustees appointed by her will, to make purchases for the benefit of the infant. The guardian, upon the determination of one of the three lives, took a new lease for three lives. The infant died; and Lord Hardwicke held, that, one life being gone, the surrender of the old lease, and acceptance of a new one, was the most beneficial purchase for the infant that could be; and, therefore, ought to have the same consequence as if done by the infant herself, at full age; and that the new lease should go to the heirs *ex parte paternâ*. He remarked, that this case was not like the case of an infant's personal estate turned into real; for the reason of *that* being still considered as personal estate, was, because of the different ages of disposition, and not out of favour to one representative, any more than another.

These cases afford an illustration of the principles which have been laid down as to conversion, though they are no longer of authority, since it was enacted by stat. 1 Will. 4, c. 65, s. 15, that new leases taken by guardians shall go to the old uses and trusts.

New leases go to the old uses.

The order of succession will not be changed unnecessarily. Land had been conveyed to certain persons, in trust "for M. O., her heirs and assigns, for ever (*n*).” On the death of M. O., her equitable estate descended to her son, who died an infant. It was held, that the estate had devolved upon his heir *ex parte maternâ*, as it was not the duty of the trustees, according to the terms of the trust, to convey the legal estate to the son (by which the land would have become descendible to his paternal heirs), till they were required to do so; and no such request had been made to them on the part of the

Order of succession not changed necessarily.

(*m*) *Pierson v. Shore*, 1 Atk. 480.

(*n*) *Langley v. Sneyd*, 1 S. & S. 45.

infant. The Vice-Chancellor, Sir John Leach, observed, that if the heir had lived to be adult, and had afterwards died without requesting a conveyance, the equitable fee would have passed to the maternal heir; that the death of the heir in his infancy made no difference; and that there is no equity between the different classes of heirs.

SECTION VIII.

Operation of Stat. 1 Vict., c. 26, on the Rule against Conversion.

Principal reason
of the rule
destroyed by
stat. 1 Vict. 26.

By the late Statute of Wills, 1 Vict., c. 26, it is enacted (*o*), that no will made by any person under twenty-one shall be valid. This law destroys the distinction between the real and personal estate of infants, so far as regards their power of testamentary disposition. It seems, however, that the previous system of management, though generally referred to the distinction which has been thus removed—a reason which is inapplicable, at all events, to the rule prohibiting the conversion of real estate into personalty (*p*)—may well be supported upon other grounds.

Reasons upon
which the rule
may be sup-
ported.

For although an infant cannot now make a will of personal estate, yet the Law of Distribution makes a provision for the younger children of an infant, where his property is personal, and none where it is real; and where he has no children, it operates in a manner more consistent with natural feeling, than the Law of Descent. A debt, too, is more easily recovered from an infant who has money, than from one who has only real estate; and, therefore, an infant will enjoy better credit in the former case. And a female infant may, by marriage, absolutely dispose of the whole of her personal property,

(*o*) Sect. 7.

(*p*) *Supra*, p. 297.

which may be settled on her and her issue; whereas no binding settlement of her real estate can be made. Besides, by retaining an infant's property unaltered, all temptation to interested interference, and to tampering with the estate for the benefit of either class of representatives, will be removed. For all these reasons, it seems, that the Court ought still to observe the rule already established, forbidding the conversion of personal estate into realty. The reasons, whatever they may have been, in which the rule against the conversion of realty into personalty originated, remain unaffected by the recent change.

If the new Statute of Wills should be considered to have removed the groundwork of the peculiar system of which an account has here been given, the consequence would seem to be that the property of infants should be placed, so far as regards conversion, on the same footing with that of lunatics.

If statute of Wills has changed the system, infant's estate will be treated like lunatic's.

A lunatic, as soon as a lucid interval arrives, has precisely the same power of disposition over one species of property as over the other. The Lord Chancellor acting, not in the Court of Chancery, but under a special commission from the Crown, does what is for his benefit *simply*; taking the advice and assistance of the presumptive next of kin and heir: whereas, in the case of infants, the Court has been in the habit of doing what is for his benefit, *regard being had to the different ages of testamentary disposition*, according to the rules which have been stated above.

Distinction between the two systems.

This distinction was explained by Lord Eldon in *Ex parte Phillips* (r); and where his Lordship made use of the following illustrations of the different modes of dealing with the two cases:—

A lunatic was seised *ex parte paternâ* of estate A., and *ex parte maternâ* of estate B., the latter being subject to a mortgage; and timber cut upon A. having been applied in discharge of the mortgage upon B., it was, on a question between the heirs, held that A. was not to be recouped.

If there is an application to sell a part of the real estate for payment of debts, the Court, finding that the maintenance of the lunatic would be better provided for, and his advantage promoted, by disposing of a real estate inconvenient and ill-conditioned, &c., and that it would be for his benefit so to pay the debts and keep together the personal estate, would have no difficulty in making such an application; and so, in cutting down timber on the estate, augmenting the personal property, it goes as personal property.

CHAPTER XXVI.

OF GRANTING AND TAKING LEASES ON BEHALF OF
INFANTS.

IT has been stated above, that a guardian in socage may make a lease for years of the infant's land, to last till the infant attains the age of fourteen; (but subject, in cases where the guardian was under coverture, to be avoided by her after her husband's death, for the benefit of the infant (*a*)); that a customary guardian may make leases warranted by the custom, not exceeding the duration of his guardianship (*b*); and that a guardian under the stat. 12 Car. 2, can make leases to last till the infant attains twenty-one (*c*); and also that a guardian in socage may enter in right of the infant, and avoid a voidable lease (*d*).

Powers of
guardians to
grant legal
leases.
Guardian in
socage :

—by custom ;

—by statute.

How voidable
leases are
avoided.

There does not appear to be sufficient authority for attributing to any other kind of guardian the right (independently of express powers contained in legal instruments) of making a lease by which any estate in the infant's land is created; a guardian for nurture, as has been already mentioned (*e*), can only make a lease at will, and guardians by the election of the infant (*g*), as well as guardians appointed by the Court, in a suit or without suit (*h*), are equally powerless.

No other
guardian can
create legal
estate in in-
fant's land.

But guardians of every kind, and trustees, and other per-

Leases by

(*a*) *Supra*, pp. 35, 36.

(*b*) P. 46.

(*c*) Pp. 91, 92.

(*d*) P. 30.

(*e*) P. 60; and see p. 71.

(*g*) P. 78; see 4 Jarman's Conv.
by Sweet, 226.

(*h*) *Supra*, p. 106.

guardians and trustees supported where beneficial to the infant, as valid contracts during minority.

Leases not to be granted without sanction of Court. Reference to approve of proposal.

Order on report. General direction to receive proposals.

Leave to let without reference.

Master may now receive proposals,

without special order,

sons acting for infants, have been in the habit of letting the infants' lands; and leases so granted have, if beneficial to the infant, been considered to be good during the minority, but only as contracts between the lessee and the persons acting for the infant.

Where there is a suit pending for the administration of an infant's property, leases must not be granted of his land without the sanction of the Court. The ancient practice seems to have been, whenever there was a proposal for a lease, to refer it to the Master, to inquire whether it would be for the infant's benefit that the lease should be made; and, upon the Master's report, to make such order as was deemed proper (*i*). It was found convenient to save the expense of a reference on each occasion, by making a general order upon the Master to consider of the leases that might be proposed from time to time, and to report thereon to the Court (*k*): and the Court has given leave without any reference at all, for the trustee to let, with the approbation of the receiver, where the estate was very small, the rent not exceeding £15 a-year (*l*).

By the 64th of Lord Lyndhurst's Orders of 1828 (*m*), it is ordered, that, in every order directing the appointment of a receiver of a landed estate, there is to be inserted a direction, that such receiver shall manage, as well as set and let (*n*), with the approbation of the Master; and that, in acting under such an order, it shall not be necessary that a petition be presented to the Court in the first instance, but the Master, without special order, shall receive any proposal for the management or letting of the estate from the parties interested,

(*i*) See *Earl of Harrington v. Flemming*, 1 Bro. C. C. 74.

(*k*) *M'Dermott v. Kealy*, Jac. 374; *Symons v. Symons*, 2 Y. & C. 1.

(*l*) *P— v. Bell*, 6 Ves. 419.

It was provided by the order, that no building leases should be made, nor leases to extend beyond the

infant's minority. The report does not state whether this was a special restriction upon any powers vested in the trustee.

(*m*) 2 Russ. App. 22.

(*n*) He was usually directed to set and let, before this order. See 3 Swanst. 304.

and shall make his report thereon, which report shall be submitted to the Court for confirmation, in the same manner as is now done with respect to reports on such matters made upon special reference; and, until such report be confirmed, it shall not give any authority to the receiver.

and report to Court.

In the rare case of there being no receiver, it would still be necessary to obtain a particular reference, or a general direction, to the Master, to enable him to entertain any proposal.

Where no receiver, there must be reference.

The Court has always reserved to itself the power of finally sanctioning leases (o).

Leave finally sanctioned by Court.

Leases made under the direction of the Court, are granted either by the guardian, or trustee, or other person having authority by virtue of his guardianship, or under a power to create a legal term in the land; or, if there be no such person, by the receiver acting on behalf of the Court, for the infant; in the latter case, no estate passes in the land, and the lease only operates as a contract or agreement.

How such leases are made.

The *ordinary* powers of the Court do not extend (where there is no one authorized by any instrument to make leases) to granting any lease to last beyond the period of minority; and, consequently, do not authorize building leases (p). Of the inconvenience arising from this defect, the following Irish case will furnish an example.

Could not be made beyond minority, except under a power.

The guardian of infants (q), without any authority, made a building lease of part of their real estate for a long term, and the lessee spent a large sum of money in raising the walls of a building; but the mistake having been discovered, a suit was instituted for the purpose of obtaining the sanction of the Court to the transaction, without which the buildings could not be finished, and the infants must lose their rent, and the

Inconvenient consequences.

(o) *M'Dermott v. Kealy*, Jac. life, to make leases which should 374; *Symons v. Symons*, 2 Y. & C. 1. bind an infant remainder-man.

(p) See 6 Ves. 419. Nor, of *Gibbins v. Howell*, 3 Madd. 489.
course, has it ever assumed jurisdiction, in a suit against a tenant for (q) *Russel v. Russel*, 1 Moll. 525.

lessee his money. It appeared by the Report, that it would be for the benefit of the infants that a lease should be made. Lord Ch. Hart said, that he had no authority to bind an infant's legal real estate, that the regular way in the case before him would be, to let it go to the Master to inquire whether any lease could be made, and if not, whether it would be for the benefit of the infants, that any application should be made for an act of Parliament, though, in very clear cases, such a reference might be dispensed with. The case of *Cecil v. Salisbury* (*r*), where it is said, that the Court "hath often decreed building leases for sixty years of infants' estates, where for their benefit"—was cited, but his Lordship said that it was not law, and that no such decree could be made.

Nor could the sanction of the Court be obtained, under its ordinary powers, for any lease whatever, unless there was a suit pending.

Infant, or his guardian, may make leases for building, &c., under direction of Court.

But by stat. 1 Will. 4, c. 65 (*s*), "where any person, being an infant, under the age of twenty-one years, is or shall be seised or possessed of, or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person, that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein, respectively, and to the nature of the tenure of such estates respectively, for such term or terms of

(*r*) 2 Vern. 224.

(*s*) Sect. 17.

years, and subject to such rents and covenants, as the said Court of Chancery shall direct; but in no such case shall any fine or premium be taken; and in every such case, the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases and covenants and provisions therein shall be settled and approved of by a Master of the said Court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the Master's office, until such infant shall attain the age of twenty-one; but with liberty to proper parties to have the use thereof, if required, in the mean time, for the purpose of enforcing any of the covenants therein contained: Provided that no lease be made of the capital mansion-house, and the park and grounds respectively held therewith, for any period exceeding the minority of any such infant.

No fine to be taken.

Counterpart executed by lessee, and preserved.

Capital mansion and grounds not to be let beyond minority.

Infants not having an indefeasible estate, are not included in this section. Infant must have an indefeasible estate.

An estate, of which J. S. died seised in fee, in the year 1833, descended upon his five infant sisters. The father and mother being alive, and the estate of the sisters being liable to be divested in whole or in part, by the birth of a brother, or a sister or sisters, it was held, that the infants were not seised of or entitled to land in fee, within the meaning of this section (*s*).

It has been stated (*t*), that guardians in socage (and consequently other guardians) have no estate capable of receiving a surrender. But the act just cited, which consolidates and amends various older statutes to a similar effect (*u*), contains a provision (*x*), that where any person, being under the age of

Infants (compellable if of age to renew) or their guardians, may,

(*s*) *Re Evans*, 2 Myl. & K. 318. such a case, ascend to the father, But now, by s. 6 of stat. 3 & 4 instead of descending to the sisters. Will. 4, c. 106, which regulates descents taking place on the death of any person since the 1st of January, 1834, the land would, in

(*t*) *Supra*, p. 36.

(*u*) See the preamble.

(*x*) Sect. 16.

twenty-one years, might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made or to be made, for the life or lives of one or more person or persons, or for any term or number of years absolutely, or determinable on the death of one or more person or persons, it shall be lawful to and for such infant, or his guardian, in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered, at the making thereof, or otherwise, as the Court, by such order, shall direct.

by direction of
the Court,

take surren-
ders,
and grant re-
newals

For lives or
years.

Valid legal
leases may be
granted under
the statute.

Under the foregoing sections it is conceived that valid legal leases for years may be granted with the sanction of the Court. But the practice seems (except in the case of building leases) to remain as it was before the statute (y), nor has it become usual to make leases under the authority of the Court where there is not a suit pending.

The following particulars as to the management of infants' lands, let on lease, may here be mentioned.

Rent not to be
abated except
on petition of
guardian.

The Court (z) will not abate the rent payable by tenant of lunatics' or minors' estate, without the consent of the committee or guardian; or rather, it should not be done except upon their petition. The committee or guardian is therefore to exercise the discretion in the first instance, not the Court or Master; unless the committee or guardian petition for the abatement, or consent to it, the Court will not act. The Master should, in such cases, always be directed to inquire, whether it would not be more for the benefit of the estate,

Inquiry
whether bene-
ficial, that the
lease should be
surrendered.

(y) *Supra*, p. 311. (z) *Anon.*, 2 Moll. 342; Turner & R. 137.

that the tenant should give up his lease, than that his rent should be reduced. It has been held in a case in Ireland, that no abatement ought to be made in the rent of a tenant for lives, renewable for ever; and that all that can be done, is, to direct an inquiry whether it would be for the benefit of the infant that a surrender of the lease should be accepted, and upon what terms (a).

In order to provide for the renewal of leases in favour of infants, it is enacted (b), that in all cases where any person, being under the age of twenty-one years, shall become entitled to any lease or leases made or granted, or to be made or granted, for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful for such person under the age of twenty-one years, or for his or her guardian or other person on his behalf, to apply to the Court of Chancery in England, or the Courts of Equity of the counties palatine of Lancaster and Durham (c) respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and by the order and direction of the said Courts respectively, such infant or his guardian, or any person appointed in his place by the said Courts respectively, shall and may be enabled from time to time, by deed or deeds, to surrender such lease or leases, and accept and take, in the place and for the benefit of such person under the age of twenty-one years, one or more new lease or leases of the premises comprised in such lease surrendered by virtue of the act, for and during such number of lives, or for such term or terms of years determinable upon such num-

Leases held by infants may be renewed by them or their guardians.

Under direction of the Court.

(a) *Hamilton v. Hamilton*, 1 of Wales. But, by stat. 1 Will. 4, Hog. 71. c. 70, s. 14, the Courts of Session and Exchequer of the county palatine of Chester, and the Courts of Great Session of Wales, were abolished.

(b) 1 Will. 4, c. 65, s. 12.

(c) Or the Courts of Equity of the county palatine of Chester, or of Great Session of the principality

ber of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise, as the said Courts respectively shall direct.

Money paid for premium paid out of infant's property, or charged on leaseholds.

And (d) that every sum of money and other consideration paid by any guardian, trustee, or other person, as a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same as the said Courts respectively shall direct and determine.

New lease to be to same uses with the old.

And (e) that every lease to be renewed as aforesaid shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devices, and conditions, as the lease to be from time to time surrendered as aforesaid, was or would have been subject to in case such surrender had not been made (g).

Trustee or guardian renewing lease renews for infant's benefit

Where a trustee or guardian renews in his own name a lease belonging to an infant, he is considered to hold the new lease in trust for the infant, and is liable to account for the profits accordingly (h). If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he will be held to have acted as trustee, and the infant may claim his share of the benefit, (contributing to the expenditure); but if the lease does not prove advantageous, the person renewing must take it upon himself (i).

Court of Chancery may appoint person to

If a person (j) bound to renew be out of the jurisdiction of the Court of Chancery, the Court may, by order, upon the

(d) Sect. 14.

(h) *Griffin v. Griffin*, 1 Sch. &

(e) Sect. 15.

Lef. 352.

(g) See *Milner v. Lord Harwood*, *supra*, p. 282; *Mason v. Day*, *supra*, p. 304; *Pierson v. Shore*, *supra*, p. 305.

(i) *Ex parte Grace*, 1 Bos. & Pull. 376.

(j) Sect. 18.

petition of any person or any of the persons entitled to renewal, (whether such person be or be not under any disability), appoint a person to take the surrender and to renew, in the name of the person bound; and the new lease is to be as valid as if the person in whose name it shall be made had executed it, and had been alive and not under disability; but the Court may, if it see fit, direct a bill to be filed to establish the right of the party seeking the renewal.

renew in the name of a person out of the jurisdiction.

May direct bill to be filed by claimant.

It is also provided (*k*), that no renewed lease shall be executed by virtue of the act, in pursuance of any covenant or agreement, unless the fine (if any) or such other sum or sums of money (if any) as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid and performed; and counterparts of every renewed lease to be executed by virtue of the act, shall be duly executed by the lessee.

Renewal not to be executed till fine paid, &c.

And (*l*) that all fines, premiums, and sums of money which shall be had, received, or paid for or on account of the renewal of any lease, after a deduction of all necessary incidental charges and expenses, shall be paid to the infant's guardian, and be applied and disposed of for the benefit of the infant, in such manner as the said Court shall direct.

Fines to be paid to guardian, and applied for infant's benefit.

The powers given to the Court of Chancery by this act, extend to all land and stock within any of the dominions, plantations, and colonies belonging to her Majesty, except Scotland (*m*), and might, till the recent statute, 5 Vict. c. 5, have been exercised by the Court of Exchequer likewise.

To what property the act extends.

By stat. 5 & 6 Will. 4, c. 17, (repealing an Irish statute of 11 Anne, by which the same objects were in part attained), the 16th and 19th sections of stat. 1 Will. 4, c. 65, were extended to Ireland, where the Courts of Chancery and Exchequer may exercise powers corresponding to those which are possessed by the Court of Chancery in England.

The act extended in part to Ireland.

(*k*) Sect. 20.

(*l*) Sect. 21.

(*m*) Sect. 36.

CHAPTER XXVII.

STATUTES AUTHORIZING GUARDIANS AND TRUSTEES TO
ACT FOR INFANTS.

By many acts of Parliament for public and general purposes, and by many local acts, the inconveniences arising from the disabilities of infant proprietors have been in great measure remedied, by enabling guardians and trustees to contract and convey on their behalf. Provision is made, in acts of this kind, for the due application of the purchase-money.

Usual provisions in acts of Parliament for application of purchase-money of infant's land. Where a loan of £200.

The clauses for this purpose generally direct (a), that when the sum exceeds £200, it shall be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer (this should now be, of the Court of Chancery (b)), and applied under the direction of the Court, upon petition in a summary way, in the purchase or redemption of the land-tax, or towards the discharge of debts or incumbrances affecting the property sold, or other property standing settled to the same uses, or in the purchase of other messuages, lands, tenements, or hereditaments to be settled to the same uses; and in the meantime, the money to be invested upon application to the Court, in the purchase of 3 per cent. stock, the dividend to go in the meantime, as the rents of the messuages &c. to be purchased would go.

Money paid into Court may be applied to necessary improvements.

Money which has been paid into Court under a Railway Act, to remain till it shall be laid out in lands to be settled to the "like uses," may be paid to trustees, to be employed on

(a) 3 & 4 Vict. c. 87, ss. 44, 45, (b) See stat. 5 Vict. c. 5.
46, 49; *supra*, p. 218, n.

new erections, which the Master has reported to be necessary (c).

If the sum is less than £200 and more than £20, it may, at the option of the guardian, either be paid into the Bank, as above mentioned, or be paid to trustees, who are to apply it in the manner above mentioned, without having recourse to the Court.

Where under
£200, and
above £20.

If the sum is less than £20, it is to be paid to the guardian for the use of the infant.

Where under
£20.

The Court is empowered to order the expenses of these proceedings to be paid by the parties by whom the infant's property has been required and paid for.

Expenses paid
by parties re-
quiring the land.

But although these clauses are in the most modern and approved form, the acts to be cited below are not uniform in their provisions, and each must be closely examined if perfect accuracy is required.

The acts not
uniform in
these clauses.

SECTION I.

Acts for the Improvement of the Metropolis.

THE provisions just cited are taken from an act for making improvements in the Metropolis, (3 & 4 Vict. c. 87), and similar provisions are contained in other acts for the same purpose, as 4 & 5 Vict. c. 12; 1 & 2 Vict. c. 7, relating to the new Houses of Parliament; 2 & 3 Vict. c. 10, relating to the British Museum; and 4 & 5 Vict. c. 27, for the purchase of lands for a Royal park.

(c) *Ex parte Shaw*, 4 Y. & C. 506.

SECTION II.

Act for vesting Lighthouses in the Corporation of the Trinity House.

Guardians &c.
may agree on
behalf of in-
fants for sale of
lighthouses.

By the act for vesting lighthouses in the Corporation of the Trinity House, guardians are empowered (*d*) to agree with the Corporation on the part of their wards, and trustees, executors, and administrators to agree on the part of their cestui que trusts, whether infants, issue unborn, or under any disability, for the sale of lighthouses.

Infant's money
charged on
lighthouses to
be paid into the
Bank.

Where any money is charged upon a lighthouse, the amount may be deducted from the purchase-money; and if the person to whom the money so charged belongs is an infant, it is to be paid into the Bank, and to be subject to the provisions regarding the purchase-money (*e*).

SECTION III.

Act to facilitate the Exchange of Lands in Common Fields.

Guardians, &c.
may exchange
lands in com-
mon fields for
others, and take
such lands in
exchange for
others.

By statute 4 & 5 Will. 4, c. 30, guardians and trustees for infants entitled to land in common fields for any estate of freehold, or for years determinable on lives, or for any term of years whereof 100 years are unexpired, are enabled (*g*) to convey such land, and to take other land in exchange for it; and guardians, &c. of infants entitled to lands not in a common field, are enabled (*h*) to exchange it for land in a common field,—but in both cases, the person to whom the next immediate vested estate of freehold in remainder or re-

Consent of re-
mainder-man.

(*d*) 6 & 7 W. 4, c. 79, s. 3. (*e*) Sect. 22. (*g*) Sect. 1. (*h*) Sect. 2.

version shall have been limited, or, in case of infancy, his or her guardian, must (i) consent, and sign the draft deed of exchange, unless the guardian, &c. shall himself be the person by whom the exchange is proposed to be made, in which case the Court of Chancery is empowered upon petition to appoint a protector to consent to the exchange and to sign the draft.

Where a protector must be appointed.

SECTION IV.

Acts for Ecclesiastical Purposes.

By the statute for augmenting the maintenance of the poorer clergy, it was enacted (k) that the agreements of guardians on behalf of infants touching the patronage of augmented cures, should be as effectual as if the infants had been of full age.

Guardians, &c. may agree touching the patronage of augmented cures ;

By stat. 1 Will. 4, c. 65, ss. 25, 26, the stat. 1 Geo. 1, c. 10, was repealed as to the section just quoted; and it is enacted, that the guardian of any infant, with the approbation of the Court of Chancery, to be signified by an order to be made on the petition of such guardian in a summary way, may enter into any agreement for or on behalf of such infant which such guardian might have entered into by virtue of stat. 1 Geo. 1, c. 10, if the same had not been repealed.

with the approbation of the Court of Chancery.

By 58 Geo. 3, c. 45, guardians and trustees for infants may (l) sell and convey, or if copyhold enfranchise, lands set out for sites of churches under the act.

They may convey land for sites of churches.

By 59 Geo. 3, c. 134 (m), guardians and trustees for infant patrons may surrender the patronage, or make agreements with the commissioners or the bishop, according to the provi-

May surrender patronage, endow chapels, dissent from building churches.

(i) Sect. 4.

tended by 3 & 4 Vict. c. 20.

(k) 1 Geo. 1, c. 10, s. 9. This statute has been amended and ex-

(l) Sect. 38.

(m) Sect. 15.

sions of the act, and may endow and agree to the endowment of chapels out of the pew-rents; they may also (n) dissent from the building or enlarging of churches or chapels out of the parish rates.

May consent to steps taken under acts for providing residence houses.

The stat. 17 Geo. 3, c. 53, (explained and amended by 21 Geo. 3, c. 66), for enabling beneficed clergymen to build or buy houses of residence, empowers (o) infant patrons by their guardians to consent to the steps taken under the act.

May exchange or sell and convey lands and messuages for parsonage-houses.

By 55 Geo. 3, c. 147, s. 12, guardians and trustees for infants are empowered, with the consent mentioned in the act, to convey to any incumbent of a benefice any messuage, outbuildings, and yards, gardens, and lands, with their appurtenances, or any messuage or outbuildings only, or any lands (with or without necessary outbuildings) only by way of exchange, or to sell and convey to such incumbent any lands not exceeding five acres, with the necessary outbuildings thereon. This act was extended to Ireland by 4 Geo. 4, c. 86, s. 29, and 5 Geo. 4, c. 8; and by 6 Geo. 4, c. 8, copyholds were made subject to its provisions.

The statute 7 Geo. 4, c. 66, (after reciting that the powers given to owners of houses, buildings, and lands, by 55 Geo. 3, c. 147, if under any disability or incapacity to convey, authorized the sale of land only, and the exchange only of houses and buildings, and that although power to purchase houses and buildings is given by statutes 17 Geo. 3, c. 53, and 43 Geo. 3, c. 107, the owners thereof, if under any such disability or incapacity, are not empowered to sell and convey the same), gives power to guardians and trustees for infants, owners of any messuage, buildings, or lands, which may be purchased under the authority of the above-mentioned statutes of 17, 43, and 55 Geo. 3, or either of them, to sell such messuages, buildings, and lands, or any of them, for the pur-

(n) Sect. 24.

(o) 17 Geo. 3, c. 53, s. 14.

poses of the said acts, or either of them, and to convey the same.

By 1 & 2 Vict. c. 107, s. 9, the powers given by the above-mentioned statute of 58 Geo. 3, c. 45, for the conveyance of lands for sites of churches, are extended to the transfer by sale or exchange of land, not exceeding five acres, for a site for a house of residence of any incumbent.

By 1 & 2 Vict. c. 23, the guardians of infant patrons are empowered (*p*) to consent to the sale and purchase or erection of residence houses; and in case of a purchase under this act, the powers of the above-mentioned statute, 7 Geo. 4, c. 66, are to apply (*q*).

Guardians of infant patrons may consent to sale, &c. of parsonage-houses.

The provisions of 1 & 2 Vict. c. 23, are extended by 1 & 2 Vict. c. 106, s. 25.

By 2 & 3 Vict. c. 18, guardians and trustees for infants are empowered (*r*) to convey, and in case of copyholds to enfranchise, messuages, lands, &c. for the residence of bishops and archbishops (*s*).

Guardians may convey lands, &c. for residence of prelates.

SECTION V.

Acts for providing Sites for Schools.

By stat. 6 & 7 Will. 4, c. 70, minors are empowered, with the consent of their guardians, to convey common or waste grounds for the site of schools and school-houses (*t*), and also to convey for the same purpose any portion of land of which they may be seised, including copyhold land, if the lord or lady of the manor shall consent (*u*). The land so conveyed not to exceed in quantity half an acre (*x*).

(*p*) Sect. 12.

26, 27.

(*q*) Sect. 14.

(*t*) Sect. 1.

(*r*) Sect. 17.

(*u*) Sect. 2.

(*s*) See also 5 Vict. sess. 2, cap.

(*x*) Sect. 6.

Guardians, &c.
may convey
land for site of
school.

By stat. 4 & 5 Vict. c. 38, the statute just mentioned is repealed, and new provisions are made for facilitating the conveyance of sites for schools; and it is enacted, that where it is deemed expedient to purchase any land for the purposes of the act "belonging to or vested in any infant or lunatic, such land may be conveyed by the guardian *or committee (y)* of such infant, or the committee of such lunatic respectively, who may receive the purchase-money for the same, and give valid and sufficient discharges to the party paying such purchase-money, who shall not be required to see to the application thereof (z)."



SECTION VI.

Acts for providing Sites for Workhouses and Prisons.

Guardians may
convey land for
workhouses and
prisons,

By the Poor Law Acts, 22 Geo. 3, c. 83, s. 22, and 59 Geo. 3, c. 12, s. 18, guardians and trustees for infants and issue unborn were enabled to convey lands, &c. to a limited extent to visitors and guardians of the poor for the purposes of the acts; and by the latter statute (a), guardians and trustees were enabled to consent to a rate for such purposes.

and consent to
rate.

They may con-
vey and ex-
change land,
&c., for pur-
poses of the
Act.

By stat. 5 & 6 Will. 4, c. 69, the guardians and trustees of any infant beneficially seised or entitled in possession as tenant in fee-simple, or in fee-tail general or special, or for his own life, or for years determinable on his own life, (such estate for life or years not being subject to any rent), or for any term of years in gross, whereof not less than 400 shall be unexpired, and subject to no equity of redemption or rent, except a nominal rent, are enabled to dispose of by way of absolute sale, or in exchange for any messuages, &c., any lands or buildings for the purposes defined in the act, to convey to the

(y) *Sic.*

(z) Sect. 5.

(a) Sect. 16.

guardians or overseers, and to accept or give monies by way of equality of exchange (*b*).

By a subsequent statute (*c*), it is enacted and declared that the provisions of stat. 5 & 6 Will. 4, c. 69, apply to lands and buildings and other hereditaments of copyhold or customary as well as those of freehold tenure; and lords of manors being under legal disability are empowered to convey as under any of the acts for building, hiring, or purchasing workhouses, or for acquiring lands for workhouse purposes.

Copyhold and customary lands within the Act.

Lords of manors empowered to convey.

By the Irish Poor Law (*d*), guardians and trustees for infants are enabled to contract for and convey the property of the infants for the purposes of the act. Stat. 7 Geo. 4, c. 74, contains similar enabling powers, with a view to the purchase of sites for prisons in Ireland (*e*).

Guardians, &c, in Ireland, may convey for purposes of poor law, and for prisons.

SECTION VII.

Tithes' Commutation Act.

By the act for the commutation of tithes, it is enacted, that whenever the patron of any benefice, or the owner of any lands or tithes to which the provisions of the act are intended to apply, or any person interested in any question as to any tithes, shall be a minor, the guardian or trustee, or in default thereof, such person as may be nominated for that purpose by the commissioners after inquiry as to his fitness, whom they are thereby empowered to nominate under their hands and seal, shall for the purposes of the act be substituted in the place of such patron, owner, or person so interested.

6 & 7 Will. 4, c. 71, s. 15.

Guardian or nominee of the commissioners, may agree for infant patron.

(*b*) Sect. 1.

(*e*) 7 Geo. 4, c. 74. See sects.

(*c*) 1 Vict. c. 50.

24, 29, 30, 31.

(*d*) 1 & 2 Vict. c. 56, ss. 37, 38.

SECTION VIII.

Admittance of Infant Copyholder.

THE ancient law as to the time and manner of admitting guardians to copyhold land on behalf of infants, as to the recovery of fines from infants, and as to the forfeiture of their estates, was complicated and vexatious (*g*). It was greatly improved by the statute 9 Geo. 1, c. 29, and that statute was repealed by 1 Will. 4, c. 65, which contains the following provisions.

Infant copyholder may be admitted in person, or by guardian or attorney.

Where (*h*) any person being under the age of twenty-one years, is entitled by descent or surrender to the use of a last will (*i*), or otherwise, to be admitted tenant of any copyhold lands, such person, in his or her own proper person, or by his guardian or attorney, shall come to and appear at one of the three next courts which shall be kept (for the keeping whereof the usual notice shall be given) for the manor whereof such land shall be parcel, and shall there offer himself or herself to the lord or his steward, to be admitted tenant to the said land.

Infant having no guardian may appoint attorney.

Any infant who has no guardian, is empowered (*h*), by writing under his or her hand and seal, to appoint an attorney or attornies, to appear and take admittance.

If infant does not appear at one of three first courts, the lord may appoint an attorney to take admittance;

In default of such appearance of any infant in person or by guardian or attorney, and of acceptance of such admittance as aforesaid, power is given (*l*) to the lord or his steward, after such three several courts have been duly holden, and proclamations in such several courts been regularly made, to appoint at any subsequent court any fit person to be attorney

(*g*) *Supra*, p. 46.

sary, 1 Vict. c. 26, s. 3.

(*h*) Sect. 3.

(*k*) Sect. 4.

(*i*) A surrender is now unneces-

(*l*) Sect. 5.

for every such infant, for that purpose only, and by such attorney to admit such infant to the said land, according to his or her estate therein, and upon every such admittance, to impose and set such fine as might have been legally imposed and set if such infant had been of full age.

and may impose fine.

Upon (m) every such admittance of any infant as aforesaid, the fine may be demanded by the bailiff, or agent of the lord, by a note in writing, signed by the lord or by his steward, to be left with the guardian, or with the infant if he have no guardian, or with the tenant or occupier of the land to which the infant shall have been admitted; and if the fine be not paid or tendered to the lord or his steward within three months after such demand made, the lord may enter into and upon the copyhold land to which the infant shall be so admitted, and hold and enjoy the same, and receive the rents, issues, and profits (but without liberty to fell timber), until by such rents, &c., the lord shall be fully paid and satisfied such fine, together with all reasonable costs and charges which he shall have been put to in levying and raising the same, and in obtaining the possession of such land, although the infant shall happen to die before such fine and fines, and the costs and charges, shall be raised; of all which rents, &c., the lord must yearly, upon demand of the person entitled to the surplus of the rents, &c., or of the person entitled to the land, render account, and must pay the surplus, if any, to such person as shall be entitled to the same.

How to be demanded.

If fine not paid may enter;

and hold till fine is satisfied.

Must account yearly upon demand.

As soon (n) as such fine and costs, &c., shall be fully paid, or if after such seizure and entry, such fine and costs, &c., shall be lawfully tendered to the lord, the infant or his guardian may enter upon and take possession of and hold the land, according to the estate or interest of the infant therein, and the lord must deliver possession accordingly; and if after such fine and costs, &c. shall be paid or tendered, he shall refuse to deliver possession, he is liable to and must

On payment or tender of fine, infant or guardian may enter.

How retainer charged with damages.

(m) Sect. 6.

(n) Sect. 7.

CHAPTER XXVIII.

OF VARIOUS MATTERS RELATING TO THE MANAGEMENT
OF INFANTS' ESTATES.

THE subject of the general investment and management of the property of infants has been already considered; the rules of law relating to maintenance and advancement have also been in some measure investigated (*a*); but it is still necessary to state some important particulars as to the rights of infants in respect of legacies and other sums of money belonging to them, and as to the miscellaneous duties towards them of executors and guardians.

Vested legacy, with gift over, interest payable till gift takes effect.

Where a vested legacy, particular or residuary, is given to an infant, no time of payment being mentioned; with a gift over upon a contingency, as upon the death of the legatee before twenty-one;—the happening of the contingency will only defeat the legacy from the time it happens; and, consequently, in the mean time the legacy will carry interest from the end of the year after the death of the testator, and the interest belongs to the infant, if he lives, or to his personal representative (*b*); for the sum given over is the sum

(*a*) *Supra*, Chapters 21 and 22.

(*b*) Williams on Executors, p. 1130, 3rd ed.; *Taylor v. Johnson*, 2 P. W. 504; *Shepherd v. Ingram*, Amb. 448; *Montgomerie v. Woodley*, 5 Ves. 522; see 3 Atk. 102, n. The case of *Branstrom v. Wilkinson*, 7 Ves. 421, seems to fall within this principle, except that as the legacy there was specific, the income necessarily belonged to the infants from the time of the testator's

death. In *Mills v. Roberts*, *supra*, p. 236, Sir J. Leach, M. R., grounded his decision upon the authority of *Branstrom v. Wilkinson*. But the decree in *Mills v. Roberts* declared the infants to be "entitled to interest on the two contingent legacies of £10,000 sterling, and £10,000 sterling bequeathed to them by the will of the said testator as in the pleadings mentioned from the death of the tes-

originally given to the infant, and not that sum with the interest accruing during the infant's life.

The same rule prevails with respect to a vested residuary bequest, not payable till the legatee attains twenty-one, and given over upon his death before that age (*e*).

So, on vested residuary bequest, payable at 21, with gift over.

But interest is not payable (except in the special cases mentioned above (*d*)) upon contingent legacies (*e*). Nor do vested legacies (not being gifts of a residue), which are not payable till twenty-one, carry interest during the minority of the legatee, if it does not appear by the will that the testator intended them to do so (*g*).

Not payable on contingent legacies;

nor on vested legacies not residuary, payable at 21; unless intention appears.

Interest given to an infant by a testator by way of maintenance, upon a contingent legacy, belongs to the infant, though his father is obliged to maintain him, and if he dies, it will go to his administrator (*h*); but where a legacy is given at twenty-one, with interest, and is given over with the interest, if the infant dies under that age, the infant can have neither principal nor interest unless he lives to twenty-one (*i*).

Interest given by way of maintenance on contingent legacy, belongs to infant, whether required or not, unless there be a gift over of the interest.

A testator gave to each of his daughters the sum of £5000, to be placed in the three per cents, the interest of which was to be for their separate use, and if any of them should die leaving children, the principal to be divided between them if they should attain twenty-one, and if they had

tator," (Reg. Lib. 1829, B. fo. C. C. 82; *Hawkins v. Cante*, 1868): whereas in *Branstrom v. Id.* 335; see *Skey v. Barnes*, 3 Mer. 335, 345.

the legacy to be vested. Nor could the decision in *Branstrom v. Wilkinson*, where the legacy was specific, afford any authority for giving interest from the testator's death: that part of the decree, therefore, at all events, must be referred to the doctrine treated of above, Ch. 22, s. 4.

(*d*) Chap. 22, s. 4.

(*e*) 2 P. W. 508, n., ed. Cox; *Descombes v. Tomkins*, 1 Cox, 188; 4 Bro. C. C. 149, n., S. C.; *Glanvill v. Glanvill*, 2 Mer. 38.

(*g*) 3 Atk. 102, n., ed. Sand.; 2 P. W. 508, n., ed. Cox.

(*h*) *Harris v. Finch*, 1 M'Clel. 141.

(*c*) *Nicholls v. Osborn*, 2 P. W. 419; *Chaworth v. Hooper*, 1 Bro.

(*i*) *Errington v. Chapman*, 12 Ves. 20.

no children, it was to be divided between the surviving sisters. Sir C. Pepys, M. R., decided, that the children of a deceased daughter were entitled to the interest of their mother's share during their minorities (*k*).

Interest given
upon the inten-
tion.

A testator directed his trustees, as soon as convenient after the decease of his wife, to raise £10,000 and invest it, to maintain his infant nephew out of the dividends, to accumulate the residue, and to transfer the said trust-moneys to the nephew at twenty-one; but if he died under age, the £10,000, and the securities on which the same should be invested, were to sink into the testator's residuary personal estate. The wife died before the testator. Lord Langdale decided, with some hesitation, that interest for the nephew's maintenance became payable from the testator's death (*l*).

A man gave £10,000 stock to his executor and other persons in trust, thus severing it from the general residue of his estate: the trustees were to pay the interest arising from part to G. S. for life: the remainder of the £10,000 was given in different shares to the testator's grandchildren named, on their respectively attaining the age of twenty-one, but if any died under twenty-one, their *portion* was to be divided amongst those who attained twenty-one; and the will did not expressly dispose of the interest during their minorities, but directed that if they all died under twenty-one, the interest *arising* from the whole legacy should be enjoyed by J. S. during his life. Lord Langdale inferred from the whole will, that the testator intended to give the intermediate interest to the grandchildren, who were to take the principal on their attaining the age of twenty-one (*m*).

A term of years was, in a settlement, limited to trustees for the purpose of raising a sum of money for the maintenance

(*k*) *Ex parte Bowden*, cited in argument, 1 Keen, 366.

(*l*) *Pickwick v. Gibbs*, 1 Beav. 271.

(*m*) *Boddy v. Dawes*, 1 Keen, 362; see *Acherley v. Vernon*, 1 P. W. 783; 3 Atk. 103; 3 Ves. 16; 1 Sch. & Lef. 5.

and education of younger children, to be applied for their benefit (in the event which happened) equally; and to be paid till their respective portions, provided for them out of other property (which was divisible among the children according to the father's appointment), should be payable and paid. The father afterwards, by his will, appointed a portion for a younger child out of the other property, to vest at twenty-one, with a direction that part of the income of the portion should be paid in the mean time for the child's maintenance and education, and the residue accumulated for her benefit. Sir J. Leach, V. C., held, upon the construction of the settlement, that the child was still entitled to her maintenance under the term until she could claim her portion (*n*).

If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way, and at all events he is entitled to it: as, if it be given to him as an apprentice fee, and he reaches the age of nineteen without having been apprenticed, it belongs to him notwithstanding, and will go to his personal representatives (*o*).

Gift for benefit of infant in one way, belongs to him at all events.

Where a testator devised to his nephew (for life, as it would seem,) all the profits of an estate, subject to a trust for the payment of debts; yet Lord Harcourt, C., held, that the uncle could not intend his nephew to starve, and directed a reasonable maintenance to be paid to him out of the profits, it appearing that the creditors were safe, or submitting to it (*p*).

Maintenance allowed to devisee or heir unprovided for.

And where a man devised his estate in trust out of the rents and profits to raise by leasing, mortgage, or sale, enough to pay what his personal estate should be deficient to pay, and subject thereto in trust for his only daughter, in strict settlement; remainder over; during the life of a jointress, the rents were not sufficient to keep down the interest of the debts, but afterwards more than sufficient; Lord Hardwicke held, that

(*n*) *Poulett v. Poulett*, 6 Madd. see *Barlow v. Grant*, 1 Vern. 255. 167.

(*p*) *Butler v. Woodall*, cited 1

(*o*) *Barton v. Cooke*, 5 Ves. 461; Ves. sen. 95.

the daughter must, as a child and heir-at-law unprovided for, be allowed (as against the remainder-man) maintenance out of the trust estate during the life of the jointress (*q*).

Maintenance, given generally, lasts for life.

Maintenance given generally, without limitation as to time, lasts for life. Thus, a reference has been directed for future maintenance, to continue during life, where the testator had given stated sums for the infant's maintenance till the age of sixteen, and at that age (which he had attained when the application was made to the Court) left him to the care of trustees, "to provide for him in some business or profession, and his future maintenance out of my funded property (*r*)."

"Maintenance, education, and bringing up," has reference to minority;

but may be extended by other words.

The words "maintenance, education, and bringing up," where no period is fixed, except what is implied in the import of the words themselves, have reference to minority only; but where rents were given by will, for the maintenance, education, and bringing up of A., B., and C., *during the life of D.*; A. and B. having died, C., though he had attained his majority, was held to be entitled to the rents, during the life of D. (*s*).

Where a testator directed the interest of a sum of money to be applied for the maintenance and education of his infant nephew, but made no disposition of the principal; the nephew was held to be entitled to the interest during his life (*t*).

Not determined by marriage.

Maintenance given during minority, is not determined by marriage (*u*).

Maintenance compelled, on words of recommendation to legatee.

A man gave the bulk of his fortune, by will, to his wife for life, and then to A. B., his great-nephew; and declared it to be his particular wish and request, that his wife, and A. B.'s grandfather (who took nothing under the will), would superintend and take care of A. B.'s education, so as to fit him for

(*q*) *Rosal v. Watkinson*, 1 Ves. 681.

93; and *Belt's Supp.* p. 68.

(*t*) *Soames v. Martin*, 10 Sim.

(*r*) *Kilvington v. Gray*, 10 Sim.

487; see *Ambl.* 663; *Alexander v.*

293.

McCulloch, 1 Cox, 391.

(*s*) *Badham v. Mee*, 1 R. & My.

(*u*) *Pride v. Fooks*, 2 Beav. 430.

any respectable profession or employment. It was held, upon the words of the request, taken in connexion with the whole contents of the will, that the widow was bound to maintain and educate the infant; and Lord Brougham, C., observed, that the grandfather was only comprehended in the recommendation with a view to procuring for the widow the assistance of a male relative in performing those offices; the expense of which she was to pay out of her legacy. The widow having neglected her duty for a series of years, a reference was directed as to the maintenance and education of A. B. in time past (x).

It seems, that if a legacy be bequeathed to be paid into the hands of a father, to be laid out by him for the education of his children, the legacy does not lapse by the father's death in the lifetime of the testator (y).

Legacy to parent for education does not lapse by his death.

A trustee was empowered by will to apply so much of the income of the estate as, in his judgment, might be sufficient and proper for the education and maintenance of the children of certain persons during their minority, and for their future advancement in life.

Circumstances under which advancement may be sanctioned.

Lord Langdale, M. R., allowed, as an advancement, a sum of money which the trustee had paid to one of the children, after her marriage (with a person in humble circumstances, who made no settlement), to provide her with things necessary by way of outfit. His Lordship also considered, that notwithstanding her marriage and attainment of majority, she was not precluded from the capacity of receiving the benefit of any application of money, for her future advancement in life; and the trustees having declined to act without the sanction of the Court, his Lordship intimated, that, if any specific mode of application were suggested, he would make a reference to the Master on the subject of such advancement. But

Outfit on marriage.

Reference for advancement.

(x) *Foley v. Parry*, 5 Sim. 138; *Wigram*. 27th June, 1842; see p. S. C. 2 M. & R. 138. 245, *supra*.

(y) *Hodgson v. Greens*, V. C.

he disallowed payments which had been made for the maintenance of the child, and her family, after her marriage and majority (z).

Where a testator provided for an infant's maintenance till the age of sixteen, and at that age left him to the care of trustees, "to provide for him in some business or profession, and his future maintenance out of my funded property;" Sir L. Shadwell, V. C., on the petition of the infant at the age of sixteen, declared that he was entitled to receive out of the testator's funded property, (besides his maintenance for life), a sum sufficient for the purpose of providing for him in some business or profession, and made a reference to the Master accordingly (a).

How far discretion of trustees will be controlled.

In the case just cited, the learned judge is reported to have said, (though it is not stated that the trustees had refused to act)—"The testator has imposed it as a duty on the trustees to take care of the infant and to provide for him in some business or profession, and his future maintenance; and the question is, whether the Court, when it sees that the testator has done so, and has pointed out the fund out of which the provision is to be made, does not take upon itself the exercise of the discretion which the testator has reposed in the trustees. Unless that be so, I do not see on what principle my decision in *Foley v. Parry* (b) could have been affirmed by the Lord Chancellor."

But in the case of *Foley v. Parry*, a man had left the bulk of his fortune to his wife, with a request (which was held to be obligatory) that she would educate A. B. She neglected for a series of years to perform this duty, and a reference was directed as to the maintenance and education of A. B. during the years when the wife ought to have maintained him. It is submitted that this case affords no authority for controlling the

(z) *Pride v. Fooks*, 2 Beav. 430. (b) 5 Sim. 138; S. C. 2 M. & K.

(a) *Kilvington v. Gray*, 10 Sim. 138; *supra*, p. 335.
203; *supra*, p. 334.

discretion reposed in a trustee, who has no pecuniary interest, and does not waive his discretion or give any indication of an intention to abuse it (c).

The rule of the Court against permitting trustees, of their own authority, to break in upon the capital of sums belonging to infants (d), is subject to many qualifications; and it has been more correctly laid down, that wherever the act done by the executor spontaneously, appears to the Court, on inquiry, to have been such as the Court would have ordered to be done, as where an unauthorized advance of capital has been made with providence and discretion, for the purpose of enabling the infant to learn a profession by which he may gain his livelihood, such expenditure will always be protected by the Court (e).

Unauthorized advance of capital allowed where beneficial.

The continuance of family charities, and in Ireland, in the absence of a statutory provision for the poor (g), the relief and employment of the tenantry in times of scarcity (h), have been held to be proper objects for the application of the infant's funds, under the authority of the Court, and references have been directed accordingly.

Allowance made for charities.

But it would seem from the following case, that there is a distinction between outlay made where the instrument under which the infant is entitled is silent on the subject, and outlay made without the sanction of some one whose consent is expressly required by such instrument.

Expenditure made without consent, where consent is required, is not protected.

A testator appointed two trustees, and gave them a power to apply for the maintenance, education, or advancement of his children, certain sums of money, constituting a capital

(c) See pp. 213, 214, *supra*; C. P. Coop. 254; *supra*, p. 296; *Thompson v. Griffin*, 1 C. & Ph. 317; see *Stopford v. Lord Canterbury*, 11 Sim. 99. (g) See 1 & 2 Vict. c. 56.

(d) See p. 255, *supra*.

(h) *In re Reddington*, 1 Moll.

(e) *Carmichael v. Wilson*, 3 Moll. 84, 88; *Umbleby v. Kirk*, 1 256; *Jackson v. Jackson*, 2 Hogan, 238.

fund in which his wife took a life interest, with remainder to the children; and he directed a new trustee to be appointed, if either declined to act. Only one of the trustees (being the mother and testamentary guardian of the children) acted, and she, without the concurrence of the other trustee, applied large sums of money for the maintenance and advancement of the children. A bill was filed by the children against the mother to compel her to replace the fund. Lord Langdale, M. R., held, that the testator did not intend that the discretionary power should be vested in anybody but the trustees; that as the other trustee had not acted, the necessary discretion had not been exercised in the application of the money; that the Court could not, after so many years, review the matter, and allow the mother the sums so applied, and that the fund must be replaced (*k*).

Total payments for maintenance not to exceed total income during minority.

Income, in abundant years, applied to recompense expenditure in bad years.

Past payments for maintenance, on ground of father's inability, allowed.

The whole amount of the money paid for an infant's maintenance, ought not to exceed the whole amount of his income during minority; but where the expenditure for maintenance has, on the whole, been reasonable, the surplus income in subsequent abundant years may be applied to recompense the guardian for what he expended for maintenance beyond the income in previous deficient years (*l*).

Expenditure for maintenance in time past, on the score of the father's inability to maintain the infant, will be protected by the Court, if the father's inability be proved (*m*).

A stranger advancing money for the support of an infant, meets with more consideration than a trustee charged with the care of paying the infant, when of age, a sum of money (*n*).

Outlay directed on application of receiver.

Upon the application of the receiver, all proper outlay on the estate will be directed, and upon a suitable scale; a reference, for instance, has been granted with a view to autho-

(*k*) *Palmer v. Wakefield*, 3 *supra*.
Beav. 227.

(*m*) 3 Moll. 87.

(*l*) 3 Molloy, 87; see p. 248, (*n*) 1 Ves. jun. 249.

rize the retainer of special counsel to defend an ejectment(*o*).

It is a general principle, that acts done by a guardian without authority will be protected, and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his own risk.

Acts by guardian without authority protected, if beneficial.

An infant having nothing to subsist on but the rents of an estate which had descended to her subject to a mortgage, the interest was suffered to run in arrear, and the mortgagee threatened to enter unless it should be made principal: and an arrangement was made to that effect by the infant and her mother, with the privity of her nearest relations. It was held, that, in this case, the interest should be allowed to carry interest because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence(*p*).

Agreements are sometimes made on behalf of infants, without judicial sanction, yet so beneficial, that they would be enforced in equity, and the infant would not be allowed to avoid them at full age.

The award in the case of *The Bishop of Bath and Wells v. Hippettsley*(*q*) would seem to have been of this kind.

So, in a case before Lord Hardwicke(*r*), infants were devisees of houses and a mill, which were out of repair, and the infants unable to repair them; the mother, acting as guardian, made a long lease of the premises, reserving rent, and the lessee covenanting to leave them in repair. Lord Hardwicke intimated an opinion, (though it was not the ground of his judgment), that this was a beneficial contract for the infants, to which the Court would bind them.

An ejectment was brought on the demise of an infant; it was afterwards compromised, (it is not said by authority of

(*o*) *Brown v. Richards*, 1 Hogan, *Marshall, supra*, p. 272. 346.

(*q*) Cited 3 Atk. 614; and *infra*.

(*p*) *Earl of Chesterfield v. Cromwell*, 1 Eq. Ab. 287; see *Blue v.*

(*r*) *Smith v. Low*, 1 Atk. 489;

S. C. West, 660.

any Court), and the tenant in possession attorned to the infant.

Lord Kenyon decided at *Nisi Prius*, that the infant could not be allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit; and he considered the agreement as binding in equity, and capable of being there enforced; and that, although the infant was not a party to the agreement, and had not confirmed it at full age, yet the compromise having taken place in a suit brought by him, he had thereby established the tenant's title as against himself, and created a new tenancy (*s*).

Partition by guardian should be by bill in equity.

It has been already stated, that ancient books attribute to guardians in socage the power of making partition so as to bind their wards (*t*); but the only satisfactory way of effecting a partition is by bill in equity.

Performance of condition plainly beneficial, supported.

And, although in the case of *Vernon v. Vernon* (*u*), the performance by guardians of a condition plainly beneficial to the infant was supported, a guardian ought always to obtain the sanction of the Court for his proceedings where there is any possibility of doubt.

Duty of trustee to preserve contingent remainders.

It has been laid down, that if trustees to preserve contingent remainders, join in destroying the remainders before the first tenant in tail is of age, they are liable for a breach of trust (*x*).

Conversion of ancient pasture into plough-land is waste.

The conversion, by a guardian, of an infant's ancient pasture into plough-land, is an act of waste (*y*); and all waste of an infant's property may be stayed by injunction in the usual way (*z*).

How trustee may purchase infant's estate.

If a trustee for an infant wishes to purchase the infant's

(*s*) *Doe d. Miller v. Noden*, 2 *Walters*, 16 Ves. 307; *Biscoe v. Esp.* 530; see *Maddon v. White*, 2 *Perkins*, 1 V. & B. 491.

T. R. 169.

(*y*) *Clark v. Thorp*, 2 Ves. 233;

(*t*) *Supra*, p. 37.

see *Liton's case*, Cary, 8.

(*u*) *Supra*, p. 284.

(*z*) See pp. 40 and 46, *supra*.

(*x*) Per Lord Eldon, in *Moody v.*

property, he should file a bill, if there is not a suit already pending, and should apply to the Court by motion for leave to bid at the sale. The Court, if satisfied upon examination into the circumstances, that the offer of the trustee was the most advantageous, would let another person prepare the particulars of sale, and permit the trustee to bid. If the Court has to deal with a purchase already completed, the transaction is sustained, or it is set aside with costs; whichever appears, upon a reference to the Master, to be most for the infant's benefit (c).

It was held, in an old case, that money lent to a guardian without security, for the purpose of paying off an incumbrance on the infant's estate, could not be followed as against the infant, though it had been duly applied; but an account was ordered as between the infant's estate, and the guardian's estate, and the creditor was to be satisfied out of what should be found due from the former to the latter (d).

Money lent to guardian without security, not to be followed.

By the act imposing a Property Tax (e), it is enacted, that the trustee or guardian of any infant, and having the direction, control, or management of the property or concern of such infant, whether such infant shall reside in Great Britain or not, shall be chargeable to the duties imposed by the act, in like manner, and to the same amount, as would be charged if such infant were of full age; and any person not resident in Great Britain, whether a subject of her Majesty or not, shall be chargeable in the name of such trustee or guardian or of any factor, agent, or receiver, having the receipt of any profits or gains arising as in the act mentioned, and belonging to such person, in the like manner, and to the like amount, as would be charged if such person were resident in Great Britain, and in the actual receipt thereof; and every such trustee or guardian, agent or receiver, shall

Guardians &c. to pay property tax for infants.

(c) See *Campbell v. Walker*, 6 Ves. 681; *Sanderson v. Walker*, 13 Ves. 601, 603, S. C. (d) *Hooper v. Eyles*, 2 Vern. 480. (e) 5 & 6 Vict. sess. 2, c. 35, s. 41.

be answerable for the doing of all such acts, matters, and things, as shall be required to be done by virtue of the act, in order to the assessing of any such person to the duties granted by the act, and paying the same.

Administration
durante minore
etate;
— where next of
kin is an infant.

Infants have always been deemed incapable of acting as administrators (*h*); and accordingly, if the person to whom the right to administration has devolved, under the statutes, be within age, another person is constituted administrator, till the infant attains twenty-one.

To whom
granted.

Administration *durante minore etate*, as it is called, is not within stat. 21 Hen. 8, c. 5, and the Ordinary may grant it to such person as he shall think fit. The person selected, where the infant is under the age of seven, or makes no choice of a guardian (*i*) to take administration, is commonly the next of kin to the infant, if there be no objection to him. Where the infant is above seven, and nominates a guardian for the purpose, he is usually admitted to administration; but the Court is not bound by the choice of the minor, nor by the claims of the infant's next of kin, or parents, or of his guardians, whether at law or by the appointment of the Court of Chancery; and may do what the circumstances of each case seem to require. Thus, administration has been given to creditors of the intestate, where the estate was insufficient to pay his debts; it has been withheld from near relatives who were very poor, or of very advanced age, or would not give proper security for the distribution of the effects; it has been given, by a new grant, during the minority of the infant, and the incapacity of the first administratrix, who had lost her senses since her appointment (*k*).

(A) See Williams on Executors, *West v. Wilby*, 3 Phillim. 379; 372, 3rd ed. *Lowell and Brady v. Cox*, Presleg., cited in *West v. Wilby*; *Rex v.*

(i) See p. 74, *supra*.

(k) *Cartright's case*, Freeman, *Battemsworth*, 1 Barnard. 370, 425; 258; *Briers v. Goddard*, Hob. 250; S. C. Fitzgib. 169; 2 Stra. 802; *Thomas v. Butler*, Vent. 219; *Appleby v. Appleby*, 1 Cas. temp.

It has also been the practice to grant administration *durante minore etate* of an infant executor (*l*). Where executor is an infant.

An infant may be appointed executor, however young he may be, and formerly he was capable of performing the duties of the office at the age of seventeen; and the administration granted *durante minore etate*, where he was sole executor, ceased when he reached that age. But now, by stat. 38 Geo. 3, c. 87 (*m*), if an infant be appointed sole executor, administration with the will annexed shall be granted to his guardian, or to such other person as the Spiritual Court shall think fit, during the infancy; and probate is not to be granted to the infant till he attains twenty-one; and (*n*) the administrator so appointed, is to have the same powers as an administrator appointed to act during the infancy of the next of kin. Executor cannot act till 21.

If the infant be named executor along with others, no administrator is appointed; for the executors who are of full age may execute the will (*o*).

Thus an infant cannot in any case act as executor.

There seems to be no difference since the stat. 38 Geo. 3, between administration during the minority of the next of kin, and during the minority of the executor.

If administration be granted during the minority of several infants, it determines upon the coming of age of any one of them (*p*). If there be several infant executors, he who first attains the age of twenty-one may prove the will and act (*q*). But if administration has been granted during the minority of How the office is determined.

Lee, 135; *Hughes v. Richards*, 2 Cas. temp. Lea, 543; In the goods of *Bwing*, 1 Hagg. 381; *Hewers v. Hewers*, Barnard. Ch. Ca. 23. (*n*) Sect. 7.
(*o*) *Pigot and Gascogne's case*, cited Brownl. 46; *Forrest v. Tremaine*, 1 Mod. 47.

(*l*) See Williams on Executors, 165, 373, 3rd ed. (*p*) Bac. Abr. Executors, (B. 3).
(*q*) 4 Burn, E. L. 283, 284, 8th ed.

(*m*) Sect. 6.

several infants, it is not determined by the death of one of them under age (*r*).

Effect of cover-
ture.

It has been said, that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have execution of the will (*s*). It is doubtful, whether, if administration be committed during the minority of an executrix, it ceases on her taking husband of full age (*t*).

Effect of in-
fant's attaining
majority;
—on suit in
equity.

Upon the determination (*u*) of an administration *durante minore etate*, a suit which had been commenced by the administrator may be added to and continued by supplemental bill. For in these cases there is no change of interest which can affect the questions between the parties, but only a change of the person in whose name the suit must be prosecuted; and if there has been no decree, the suit may proceed, after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff. But if a decree has been obtained before the event on which such a supplemental bill becomes necessary, though the decree be only a decree *nisi*, there must be a decree on the supplemental bill, declaring that the plaintiff in that bill is entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual (*y*).

On action at
law.

If an administrator *durante minore etate* of an executor

(*r*) *Jones v. Strafford*, 3 P. W. 89.

(*s*) Wentw. Off. Ex. c. 18, p. 392; Toller, 31.

(*t*) See Williams on Executors, *ubi supra*.

(*u*) Lord Redesd. 64, 4th ed.; *Jones v. Bassett*, Prec. Ch. 174; *Coke v. Hodges*, 1 Vern. 24; *Stubbs v. Leigh*, 1 Cox, 133.

(*y*) *Brown v. Martin*, 3 Atk. 218.

brings an action and recovers, and then his time determines, the executor may have *scire facias* upon that judgment.

If such administrator obtains judgment, he may bring *scire facias* against the bail, and they cannot object that the infant has come of age; for the recognisance is to the administrator himself by name (z).

If a man obtains judgment against an administrator *durante &c.*, and afterwards the executor or administrator comes of age, a *scire facias* lies against him upon the judgment (a).

An administrator *durante &c.* may do all acts which are incumbent on an executor, and which are for the advantage of the infant and the estate of the deceased (b), and he may retain for his own debt (c). But he cannot do anything to the prejudice of the infant; and, therefore, he cannot sell the goods of the deceased any farther than they are necessary for payment of debts, nor can he otherwise sell a term for years during the minority of the infant (d).

Powers of administrator *durante minore etate*.

If an administrator *durante &c.* brings an action, he must aver in his declaration that the infant is within the age of twenty-one years (e): but where he omits to do so, the defendant must take advantage of the omission by way of plea or demurrer, and cannot object to it after he has joined issue with the plaintiff on another point, which admits the continuance of his authority (g). So, a general averment that the infant is "under age," without saying under what age, has

How infant affects the pleadings in action by administrator *durante minore etate*;

(z) Bac. Abr. tit. Executors with some limitation, *ad opus et* (B. 1) 3. *urum* of the infant only; 6 Rep.

(a) *Sparkes v. Crofts*, 1 Lord 67 b.; Bac. Abr. Leases (I. 7); Raym. 265. Touchstone, 490; Wentw. Off. Ex.

(b) Bac. Abr. Executors (B. 1) 2. 393, 14th ed.

(c) *Rosbilly v. Godolphin*, T. (e) *Piggot's Case*, 5 Rep. 29 a.; Raym. 483; Com. Dig. Administration (F.) *Walthall v. Aldrich*, Cro. Jac. 590; *Slater v. May*, 6 Mod. 304; 38 Geo.

(d) Bac. Abr. Executors (B. 1) 2. 3, c. 87, s. 16.

It seems that administration *durante minore etate*, may be granted 3. (g) Bac. Abr. Executors (B. 1)

been held sufficient after verdict, and to be cured by pleading over. And at this day, it should seem that an objection to such an averment could only be sustained, if at all, on special demurrer (*h*).

—and actions
against him.

But if an action be brought against such an administrator, the plaintiff in his declaration need not aver that the infant is still under age; for this is a matter more properly within the conusance of the defendant, and if his power be determined, he ought to shew it (*i*).

It seems (though the authorities are not quite clear) that such a suit abates by the infant's coming of age, pending the action (*k*).

His duties when
the infant
comes of age;
how the infant
can make him
account.

An administrator *durante* &c. ought to pay over the remaining assets to the infant when he comes of age; and if he wastes the assets, the proper way for the infant to charge him is by action on the case (*l*). If there be a revocation and new grant of administration, the first administrator must account to the second, and even in that case the infant at full age may compel the first administrator to account over again to him (*m*).

But he cannot be called to account except by the infant at full age; and if he is brought before the Court without the latter he may demur for that cause (*n*). It seems that he is not chargeable at the suit of a creditor after the infant comes of age; but the creditor must sue the infant, and the infant has his remedy over (*o*).

(*h*) *Wells v. Some*, Cro. Car. 240; *Owen v. Holden*, 2 Sid. 60; 383.

Beal v. Simpson, 1 Lord Raym. 408; *Williams on Executors*, p. 2.

383, 3rd ed. (*m*) *Roll. Abr. Executors* (M.)

(*i*) *Carver v. Haselrig*, Hob. 251; pl. 3.

Walthall v. Aldrich, Cro. Jac. 590; (*n*) Per Lord Hardwicke, in *Croft v. Walbanke*, Yelv. 128; *Fotherby v. Pate*, 3 Atk. 603.

Beal v. Simpson, 1 Lord Raym. 409, by Powell, J. (*o*) *Bac. Abr. Executors* (B. 1) 2.

Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante* &c., if the executor of an executor (*p*), is *loco executoris*, and the representative of the first testator (*q*). Representation.

(*p*) *Anon.* Freem. 288.

5, ch. 3, s. 3; Bac. Abr. tit. Exe-

(*q*) See this subject fully treated, cutors; Burn, E. L. tit. Wills.
Williams on Executors, Part 1, B.

CHAPTER XXIX.

ACCOUNTS OF INFANTS' ESTATE.

Ward coming of age should be put in possession, and account rendered.

Action of account.
Bill in equity.

Receivers to pass their accounts regularly.

Guardian not compelled to account specifically for maintenance money, unless in case of misconduct.

WHERE there is a guardian or trustee for an infant, and no suit is pending, the latter ought to be put in possession of his property, and to have an account of the management rendered to him, when he comes of age. At that period, he can maintain an action of account at common law; but the more convenient way of obtaining an account is by bill in equity, which may be filed even during the infancy (a).

When a ward of Court comes of age, he will be put in possession of his property on presenting a petition, stating the fact, and properly verified.

Receivers are always expected to pass their accounts regularly; and guardians of the person and estate, appointed without suit, may be made to account by enforcing their recognisances (c).

The common rules as to taking the accounts of trustees and executors, are applicable to the case of guardians.

When, however, an allowance has been ordered by the Court for the maintenance of an infant, the guardian is so far confided in, that he is not bound to account specifically for that allowance (d). But if a fraud is practised on the Court, as if a guardian, getting £100 a year, maintains the infant at the rate of £20 a year, the Court will check any such abuse

(a) See *Gage v. Bulkeley*, Ridg.

Rep. t. Hardw. 279.

(b) See *infra*.

(c) *Supra*, 108.

(d) *Moor v. Lacy*, Appendix III.

by making an order on the guardian to account before the Master for the application of the maintenance money.

In the case of the *Earl of Pomfret v. Lord Windsor* (e), Lord Hardwicke said, "There are several things this Court may do *ex officio* for infants. The Court often gives extrajudicial directions for an infant, and hears a person as *amicus curiae*. I remember in Lord Macclesfield's time, in the case of the late Lord Dudley, on the mismanagement of his estate, a stranger came and complained of the guardian, and abuse of the infant's estate; upon this application, and his undertaking to pay the costs, the Court directed the Master to examine the receiver's accounts to see whether the infant was wronged or not."

Receiver's accounts examined on application of stranger.

A guardian having brought an action against his ward for board &c. before he had passed his accounts in the Court of Chancery, an injunction to stay proceedings at law was granted, and was continued till the hearing; and Lord Hardwicke observed that, in taking the account, the Court would allow the guardian according to the maintenance allotted for the infant, which a jury would have no regard to (g).

Guardian not to sue his ward at law before passing accounts.

In equity the party requiring the account may have a discovery of books, papers, &c., and the party's oath, for the more easy taking the account; which cannot be so well done at law (h).

The accounting parties cannot obtain an acquittance and discharge by paying into Court the funds to which the infant is entitled, until the Master has taken the accounts, and made his report (i).

Accounting parties not discharged by payment before report.

Where (k) a person, on attaining his full age, filed a bill for an account against his guardians or trustees, and also against a man who had acted as receiver or manager under them, and

Receiver having accounted to guardians, need not account to infant.

(e) 2 Ves. 484.

(i) *Boncraft v. Rich*, 1 Bro. C. C.

(g) *Anon.*, 3 Atk. 618.

56, and note.

(h) See Ridg. Rep. t. Hardw. 278.

(k) *Clavering's case*, Prec. Ch. 535, (Trin. Term, 1720).

had passed his accounts before them; the receiver pleaded the accounts themselves, and the plea was held to be good as to him; for the guardians or trustees had sufficient authority to employ the manager, and therefore to allow his accounts, and the remedy of the infant was only against the guardians or trustees themselves.

Guardians are allowed all proper outgoings.

Guardians are allowed for all proper outgoings—as, where money is expended in the repair of a bridge, which the infant is bound by tenure to repair (*l*).

Receiver not to charge for trouble taken without order. Receiver's accounts already passed reviewed on errors stated.

A receiver will not be allowed to charge for any extra trouble which he has taken without the order of the Court (*m*).

A receiver's accounts which had been passed, were ordered to be reviewed from the commencement, on the application of a late ward of Court, who had attained his full age, stating some errors in the accounts already passed (*n*).

Protection to infants settling accounts, while under influence of guardianship.

In settling accounts out of Court, the protection to infants is continued after they have attained twenty-one, until they have acquired all the information which might have been had in adult years (*o*); and accounts settled and releases given under the influence of those relations which exist between guardian and ward, or upon imperfect information, will not be allowed to stand (*p*), although where a considerable time has elapsed before complaint is made, the party complaining will be restricted to surcharging and falsifying as to the errors charged (*q*).

Relief restricted where complaint tardy.

Liabilities of receiver and his surety.

Where an infant's land has been let under the authority of the Court, and recognisances given for the payment of the rent, if any rent is lost by the neglect of the receiver, he must make it good to the estate, and the surety ought only to pay

(*l*) See *Rez v. Sutton*, *supra*, p. 40. (*p*) *Steadman v. Palling*, 3 Atk. 422; *Walker v. Symonds*, 3 Swanst.

(*m*) *Re Ormsby*, 1 Ba. & Be. 189. 1; *Wedderburn v. Wedderburn*, 4

(*n*) *Wildridge v. M'Kane*, 2 M. & C. 41; S. C. 2 Keen, 422; see Moll. 545; see *M'Can v. O'Ferrall*, p. 749.

1 West Rep. D. P. 593. (*q*) *Brownell v. Brownell*, 2 Bro.

(*o*) 3 Swanst. 69; *supra*, Ch. 23. C. C. 62.

what the receiver did not get from the tenant, and could not have got, even if he had used due diligence (*r*).

It has been held in Ireland, that a recognisance by a guardian in the matter of an infant, does not constitute a debt to the crown, so as to be recoverable by crown process, which issues only for public debts (*s*).

Guardian's recognisance not a debt to the Crown.

It seems that a guardian is privileged from arrest while coming to town, under a Master's order, to pass accounts in an infant suit (*t*).

Guardian privileged while rendering accounts.

A stranger who enters upon an infant's land, is called guardian *de son tort*, and may be compelled to account (*u*).

(*r*) *In re Skerretts*, 2 Hogan, 192. (*t*) *In re Odells*, 2 Molloy, 525.

(*u*) See more as to accounts, *supra*.

(*s*) *Ex parte Usher*, 1 Ba. & Be. 199. It is not stated in what form the recognisance was taken. *pra*, pages 32, 38, 39, 40, 44, 64, 106, 117.

CHAPTER XXX.

ACTIONS AT LAW ON BEHALF OF INFANTS.

Process.

WHERE an infant becomes plaintiff in an action at law (a), the process is sued out in the name of the infant. But an infant cannot prosecute an action in person, and some person of full age must conduct it for him.

Infant sues by *prochein amy.*

By analogy to the provisions of stat. West. 1 (3 Ed. 1), c. 48, which gives an infant the right to sue by his *prochein amy* against his guardian in chivalry, who shall have aliened any portion of the inheritance of the infant (b),—and of stat. West. 2 (13 Ed. 1), c. 15, by which, in every case in which persons within age may sue, it is ordained, that if they be eloigned, so that they cannot sue personally, (which in those unquiet times might frequently happen), their next friends shall be admitted to sue for them: the Court, in all cases where a party cannot sue for himself, appoints (either before or after the suing out of process) a *prochein amy* as its officer to conduct the suit for him, and to look after his interests, and no appointment or subsequent confirmation by the party is requisite, whether he be an infant of the tenderest age, or of years of discretion; nor does it signify at all, whether he is cognizant of the proceedings or not, or whether he is in this country or abroad; and he cannot disavow the action. The judgment in the action is binding on the infant, and he cannot, on attaining his age, commence fresh proceedings on the same cause of action (c). Or the infant may sue by

**Origin of the
office ;**

—appointed by
the Court.

Infant's concurrence not requisite.

Or infant may sue by guardian.

(a) See 2 Saund. 117, f. note (1), 5th ed.; and 2 Archbold's Practice, 880, 7th ed. (Chitty).

(b) Supra, p. 13.

(c) *Morgan v. Thorne*, 7 Mee. & W. 400.

guardian (the ancient mode (*d*) by the common law, before stat. West. 1), who, it is said, does require some warrant or authority on behalf of the infant (*e*); and the effect upon the infant's interest is the same (*g*). The guardian, like the *prochein amy*, must be appointed by the Court, before the plaintiff can proceed in the action, and no legal right of parentage or of guardianship will enable any one to act for the infant without such appointment (*h*).

A special admission of *prochein amy* or guardian to prosecute or defend for an infant, gives no authority to prosecute or defend in any but the particular action or actions specified (*i*).

What authority is conferred by admission.

An infant ought not to sue by attorney, and if he does, his infancy may be pleaded in abatement (*k*).

Infant must not sue by attorney.

(*d*) Hargr. Co. Litt. 135. b., n. (1).

(*e*) F. N. B. 27 (J.); 2 Inst. 261.

(*g*) Cro. Car. 86, 161.

(*h*) The practice as to the appointment of *prochein amy*, or guardian, is stated as follows, in Archbold's Practice, *ubi supra*.

Let the person intended as *prochein amy*, or guardian (being some friend of the infant, who is willing to prosecute the action for him), attend with the infant before a judge at chambers, who will grant his fiat for one of the Masters to draw up the rule, or in the Common Pleas he will at once grant the admission. In the Court of Queen's Bench, and Exchequer, draw up the rule with one of the Masters (or in the Common Pleas take the admission to the Master's office, and get it entered on the remembrance roll, and leave the admission there). Annex a copy of the rule (or, in the Common Pleas, of

the admission) to your declaration, before you deliver it.

If the *prochein amy*, or guardian, and infant, cannot attend, write out a petition to be signed by the infant, praying to be admitted to prosecute, &c., by A. B.; and at the foot of it write a consent, to be signed by the *prochein amy*, &c.; and lastly, make an affidavit of the signing of the petition and consent on plain paper. Let these be presented to the judge at chambers, who will thereupon grant his fiat (or, in the Common Pleas, the admission), and you proceed to draw up the rule, &c., as is above directed.

Practice as to the appointment of *prochein amy* or guardian.

(*i*) New Rules, H. T., 2 W. 4, r. 2; see Stra. 305.

(*k*) In *Forrist v. Tremaine*, 2 Saund. 212, it was resolved, that there was an exception in the case of an infant executor suing along with his co-executors.

Liability of
prochein amy
for costs.

Defendant en-
titled to know
his residence.

Defendant in
ejectment en-
titled to have a
responsible
plaintiff.

So in other ac-
tions, *semble*.

The *prochein amy* or guardian, who appears to be such upon the record, is *prima facie* liable to the payment of costs, as well to the plaintiff's attorney as to the defendant, though he did not interfere in the action, and was not interested in the event (*l*). The defendant is therefore interested in his solvency, and may, by application to the Court or to a Judge at chambers, obtain notice of his residence (*m*).

In ejectment, if the lessor of the plaintiff be not a real and substantial person, the defendant after pleading may move to stay proceedings till the lessor of the plaintiff finds some person to be security for costs by the appointment of a guardian, or of a real plaintiff (*n*).

In other actions, also, attempts have been made on the part of the defendant to compel the *prochein amy* or guardian to give security for costs. The practice has not been uniform on this subject.

In the case of *Yarworth v. Mitchel*, where the *prochein amy* was the infant's father, the Court refused to make the plaintiff give security for costs, though the father was sworn to be insolvent (*o*); while in *Mann v. Berthen* (*p*), where the guardian was not said to be related to the infant, and was sworn to be insolvent, the Court did require such security.

The latest reported case on this subject is that of *Watson v. Fraser* (*q*), where the plaintiff was an infant, suing by his next friend, and (upon affidavit that the *prochein amy* was at the time of his appointment, and still was, an uncertificated bankrupt) a rule was obtained calling on the plaintiff to shew cause why all proceedings should not be stayed till the *prochein amy* should give security for costs, or another *prochein*

(*l*) *Marnell v. Pickmore*, 2 Esp. *Percivall*, Barnes, 183; *Anon.*, 1 473. But he may shew, if he can, Coop. 128; *Roberts v. Roberts*, 6 Dowl. 556.

(*m*) *Tomlin v. Brookes*, 1 Wils. 246.

(*n*) See *Thrustout d. Dunham v.*

(*o*) 2 D. & R. 423.

(*p*) 4 Moo. & P. 215.

(*q*) 9 Dowl. 741.

amy be appointed. Parke, B., remarked that *Yarworth v. Mitchel* is cited in the case of *Mann v. Berthen*, and must be considered as overruled by it; and his Lordship proceeded—"It is entirely in the discretion of the Court to appoint a proper person to be *prochein amy*. The object is to protect the rights of the infant, and I by no means wish to lay down, as a general rule, that it is any objection to a *prochein amy* that he is poor, but in this case there has been a sort of imposition practised on the Court in procuring the appointment of an improper person. The father is the person who is naturally entitled to take care of the infant, but instead of him, a person is brought forward who is incapable of holding any property whatever. If that fact had been represented to the Court, they would not have made the appointment. It is highly improper that such a person should be appointed, as all the property which he may obtain would belong to his assignees. The rule must be absolute."

It is laid down that the *prochein amy* or guardian ought to be a responsible person (*r*); and where the contrary was the case, it is stated that a judge at chambers made an order for the appointment of a responsible person in his stead (*s*). Or he may be removed upon cause shewn, at the instance of the infant himself, by an order of the Court of Chancery (*t*), or of the Court which appointed him.

How the *prochein amy* may be removed.

In the commencement of the declaration, it is stated, that the plaintiff is an infant, and that he sues by A. B., who is admitted by the Court to prosecute for him as his next friend, &c. If it be not stated, that the *prochein amy* or guardian is admitted by the Court, it is error (*u*); but if it be so stated in the declaration, the want of an entry of it on the

Form of declaration.

(*r*) See *Turner v. Turner*, Stra. 708.

(*t*) *Davies v. Lockett*, 4 Taunt. 765.

(*s*) *Anon.*, case cited 2 Arch. Pr. 890, 7th ed.

(*u*) *Combers v. Watton*, 1 Lev. 224.

roll will not be error (*x*); and the Court, if in fact there be such an admission, will allow it to be entered on the record at any time (*y*). The declaration in other respects is the same, and is delivered and filed as in ordinary cases. A copy of the rule of admission is delivered with it, for until the rule be served, the defendant is not compellable to plead (*z*). If the *prochein amy* or guardian is changed pending an action, the fact ought to be stated by an entry on the record (*a*).

Prochein amy cannot be witness for plaintiff.

The guardian or *prochein amy* cannot be a witness for the infant, since he is liable for the costs (*b*). But he may be a witness against the infant (*c*).

The other proceedings in an infant's action are the same as in ordinary cases.

By the old law, indeed, the parol sometimes demurred when the plaintiff was an infant, but this is now abolished (*d*).

Infant cannot sue as informer.

An infant cannot sue as an informer on a penal statute, for an informer must exhibit his suit in person, and prosecute it either in person or by attorney (*e*).

Costs of infant plaintiff. Prochein amy liable.

In ejectment plaintiff liable. Whether liable in other actions, query?

If the defendant be entitled to costs, he may proceed for them by attachment against the *prochein amy* or guardian (*g*). It seems that in ejectment he may proceed in the same manner against the infant himself (*h*); and in other actions, where the infant having sued by *prochein amy* has been taken in execution for non-payment of costs, the Court has declared that his arrest, if wrong, was to be treated as *error*, and has re-

(*x*) 4 Rep. 53 b.; 1 Sid. 173.

(*y*) *Young v. Young*, Cro. Car. 86; Hutt. 92; S. C. 1 Lev. 224.

(*z*) See 2 Saund. 117, f., n. (1), 5th ed.

(*a*) *Davies v. Lockett*, 4 Taunt. 765.

(*b*) *Clutterbuck v. Lord Huntingtower*, Stra. 506; *Hopkins v. Neal*, Ibid. 1026.

(*c*) *James v. Hatfield*, Stra. 548.

Ruled *contra* at Nisi Prius by Abbott, J.; *Cowling v. Ely*, 2 Stark. N. P. C. 366.

(*d*) See p. 360, *infra*.

(*e*) See 2 Arch. Pr. *ubi supra*.

(*g*) *Slaughter v. Talbot*, Barnes, 128.

(*h*) See cases cited in *Thrustout v. Dunham v. Percivall*, Barnes, 183.

fused to discharge him upon motion (i). And where he had sued in his own name, concealing his infancy (k), his discharge has been refused. But in one of the cases cited, Bayley, B., expressed a doubt, whether an infant had been properly taken in execution for the costs of a nonsuit (l). And it seems that when an infant sues by guardian, he cannot be attached for non-payment of costs (m). Infant suing by guardian not liable.

- (i) *Gardiner v. Holt*, Stra. 1217; (l) *Dow v. Clark*, 2 Dowl. 302.
Dow v. Clark, 1 Cr. & M. 860; (m) *Ibid.*, and *Grave v. Grave*,
 S. C. 2 Dowl. 302. Cro. El. 33; *Turner v. Turner*, 1
 (k) *Finlay v. Jowle*, 13 East, 6. Stra. 708; S. C. 2 P. W. 296.

CHAPTER XXXI.

ACTIONS AT LAW AGAINST INFANTS.

Process.

Where infant
not held to bail.

IN actions at law the process against an infant is the same as in ordinary cases (*a*). An infant should not, however, be held to bail in any case where the plea of infancy would be a legal bar to the action. But if he has been held to bail, the Court will not discharge him out of custody upon allegation of his infancy, for his infancy cannot, unless pleaded, exonerate him from the debt, and it cannot be certain at that stage of the proceedings whether he will plead it (*b*).

Outlawry.

An infant may be outlawed, if he is above the age of twelve years (*c*).

The declaration is the same, and is filed and delivered as in ordinary cases.

Infant defends
by guardian.

Infants ought in all cases, either original or in *error*, to appear and defend by guardian (*d*), who is appointed in the same manner as the guardian or *prochein amy* of an infant plaintiff, and whose admission, if special, will only authorize the defence of the action specified in it (*e*).

The rule or order for the admission of a guardian should be obtained before plea, and a copy of it annexed thereto (*g*).

Proceedings,
where defend-
ant does not
appear.

A common appearance cannot be entered for the defendant by the plaintiff (*h*), and, therefore, where the defendant ne-

(*a*) See 2 Saund. 117, f., n. (1), 212, n. (4), 5th ed.; 2 Arch. Pr. 892, 7th edition. (*d*) Co. Litt. 136. b.; Stra. 783; 7 Taunt. 488; 1 Moo. 250.

(*b*) *Madox v. Eden*, 1 Bos. & P. 480.

(*e*) See p. 353, *supra*.

(*c*) Co. Litt. 128. a.; Dyer, 104, b.

(*g*) See 2 Saund. 117, f., n. (1), 5th ed.

(*h*) *Nunn v. Curtis*, 4 Dowl. 729.

glects to enter an appearance, the Court or a Judge, upon application and without summons, will make an order, that unless the infant appear within six days after personal service of the order, the plaintiff may assign John Doe for his guardian, and enter a common appearance for the defendant,—and upon affidavit of the service of this order, and shewing the original, the Judge will make the order absolute. An admission is then drawn up, and a common appearance entered as in ordinary cases (i).

An infant defendant ought not to appear by attorney (k).

Infant must not appear by attorney.

If an attorney has undertaken to appear for him, he must appear for him by guardian (l); and if the infant appears by attorney, the Court will at any time before judgment order the appearance to be set aside as irregular, and the defendant to appear by guardian (m). But six days before making an application to the Court for this purpose, the plaintiff ought to require the defendant to name a guardian and appear by him (n).

Where an infant defendant has appeared by attorney, and the mistake has not been corrected, it is error (o); and if several defendants appear by attorney, and one is an infant, it is error, and as the judgment is entire, it shall be reversed against all (p). But it has been held (q), that the defendant ought not to be allowed to assign this error in ejectment, for he comes in of his own accord, and prays to be made defendant, which the plaintiff cannot oppose; and although an infant

Appearance by attorney is error.

Except in ejectment.

(i) 2 Saund. 117, f., n. (1), 5th ed.; *Stone v. Atwell*, Stra. 1076;

Shipman v. Stevens, 2 Wils. 50 b.

(k) *Oliver v. Woodruffe*, 7 Dowl. 166.

(l) *Stratton v. Burgis*, Stra. 114; *Poover v. Jones*, Ibid. 445.

(m) *Hindmarsh v. Chandler*, 7 Taunt. 488; S. C. 1 Moo. 250; *Paget v. Thompson*, 3 Bing. 609; *Beven v. Cheshire*, 3 Dowl. 70.

(n) *Shipman v. Stevens*, 2 Wils. 50 b.

(o) *Bird v. Pegg*, 5 B. & Ald. 418; see 2 Saund. 212, n. (4), 5th ed., and the authorities there cited.

(p) *Bird v. Orms*, Cro. Jac. 289; *King v. Marborough*, Ibid. 303; 1 Roll. Abr. 776, pl. 9; *Grell v. Richards*, 1 Lev. 294.

(q) *Goodright v. Wright*, Stra. 33.

defendant, against whom judgment has been given, may assign for error that he appeared by attorney; yet if judgment be given in favour of an infant defendant, the plaintiff shall not avail himself of the infant's appearance by attorney, as a ground of error (r).

Parol demurrer. Where an infant heir was sued on a specialty of his ancestor, it was the rule, until the passing of stat. 11 Geo. 4 & 1 Will. 4, c. 47, that the parol demurred; that is to say, the heir might plead that he was an infant, and that he ought not to answer until he was of age (s).

The principle. The reasons upon which this rule was founded, were explained by Lord Ellenborough, C. J., in a modern case (t).

The privilege given to the infant heir to make the parol demur till he was of full age, was not merely on account of his inability to defend himself by reason of his infancy, but from an absolute deficiency of funds arising out of the nature of the feudal tenure; for during the subsistence of wardships, the estate of the heir in chivalry was, during his minority, in the hands of the guardian in chivalry, who had the whole profits of it. How the privilege came to be extended at common law to other heirs, is lost in antiquity. It is enough to say, that it is an anomaly in the law, and confined to heirs (u). So, where there were several heirs at common law, and one an infant, the parol would demur as to all; because, as all were to contribute, it would have been hard that the adults should plead, and have judgment and execution against them, when they could not have contribution from the infant; and, in some cases, the parol demurred even against the infant (v).

(r) *Bird v. Pegg*, 5 B. & Ald. 485.

418.

(s) Com. Dig. "Enfant." (D.), See Gilbert's History of the Common Pleas, p. 56; Co. Litt. 3; Pleader, 2, (E.) 3. Set. Dec. 290. a.

268.

(v) *Markal's case*, 6 Rep. 3;

(t) *Plaskett v. Beeby*, 4 East, see 2 Atk. 531.

The parol demurred only where lands in fee descended absolutely to an infant heir, and not where he took as special occupant, nor in any other case (*v*).

But now by stat. 1 Will. 4, c. 47, s. 10, it is enacted, that from and after the passing of the act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur; but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of the act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur.

Parol demurrer abolished.

The guardian of an infant defendant is subject to the same liability for costs as the *prochein amy* or the guardian of an infant plaintiff (*x*). The infant himself is liable for costs, and may be taken in execution (*y*), and the Court of Common Pleas has declined (*z*) to discharge an infant defendant in an action of slander brought against him at the age of fifteen, from execution for damages and costs, although the Insolvent Court had refused to relieve him, as not being within the act then in force (*a*).

Costs of defendant.
Guardian liable.
Defendant may be taken in execution.

A judgment signed upon a warrant of attorney has the same force with a judgment obtained by means of an action which has been resisted, since the former is only resorted to in order to shorten the process, and to lessen the expense of the proceedings (*b*). But if judgment has been given against an infant in an action to which he has appeared by attorney, this is, as has been already stated, error, upon which the

Effect of judgment signed upon warrant of attorney.

(*v*) *Chaplin v. Chaplin*, 3 P. W. 629; S. C. 1 Scott, 594; S. C. 1 Bing. N. C. 692.

(*x*) *Supra*, p. 356.

(*a*) 7 Geo. 4, c. 57, s. 11.

(*y*) See *Gardiner v. Holt*, Stra. 1217.

(*b*) See Cooke on Insolvents, c. 10, 2nd ed.

(*z*) *Defries v. Davis*, 3 Dowl.

judgment would be reversed: for the same reason a judgment signed upon a warrant of attorney, given by an infant, is liable to be vacated; and a warrant of attorney by an infant to confess judgment is absolutely void, and the Courts cannot in any case make it good, though there appear circumstances of fraud on the part of the infant, and even some benefit derived by him from the execution of the instrument, as where he had, by the execution of it, obtained the liberty of his person, and had given it in collusion with his brother, who had joined him in a previous warrant of attorney (*c*). And where it is given by an infant jointly with an adult, the judgment will be vacated against the infant, though not against the adult (*d*), or the warrant of attorney itself will be set aside to the same extent (*e*).

Warrant of attorney not set aside without proof of infancy.

Although an infant cannot legally give a warrant of attorney, yet, if he has given one, and seeks to set it aside, he must prove his infancy distinctly.

Where a man (*g*) had opened a shop, and carried on trade, holding himself out as a person of full age, and granted a warrant of attorney, the Court refused to set it aside on his own affidavit, that, when he gave it, he was "an infant of the age of twenty years, or thereabouts," together with a copy of his register of baptism.

(*c*) *Saunderson v. Marr*, 1 H. Chit. Rep. 708 (n.); but see the Bl. 75; see *Storton v. Tomlins*, 2 next case.

Bing. 475.

(*e*) *Ashlin v. Langton*, 4 M. &

(*d*) *Motteux v. St. Aubin*, 2 Sir Scott, 719.

W. Bl. 1133. *Contra* as to the (*g*) *Weaver v. Stokes*, 1 M. & latter point, *Wood v. Heath*, 1 W. 203.

CHAPTER XXXII.

SUITS IN EQUITY ON BEHALF OF INFANTS.

SECTION I.

Infant sues by next Friend.

AN infant (*a*) is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit. Yet it is frequently requisite, in justice both to the infant and to others, that his rights should be ascertained and enforced without waiting till he comes of age (*b*). There is, for instance, no regular mode of calling an executor to account for an infant's property in his hands but by bill; and no other proceeding can exonerate the executor or bind the infant (*c*); and though there may be no cause for litigation, it is frequently desirable to obtain for an infant the general protection and superintendence of the Court of Chancery. When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of the Court of Chancery, or when it is desired that he should become a ward of the Court, his nearest relative is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is, therefore, termed his next

Infant sues by
next friend.

(*a*) Lord Redesdale on Pleading, p. 25, 4th ed.

(*b*) 1 Ves. jun. 195.

(*c*) *Re Burke*, 1 Ba. & Be. 74.

Any person may institute a suit on behalf of an infant ;

he is named next friend in the bill.

Bill may be brought on behalf of infant in *ventre sa mere*.

Consent of infant not necessary.

Plaintiff, on coming of age, entitled to have his name struck out.

friend (*d*). But as it may happen that the nearest relative himself withholds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the Court, in favour of infants, will permit any person to institute suits on their behalf (*e*); and whoever acts thus the part which the nearest relation ought to take, is also styled the next friend of the infant, and as such is named in the bill (*g*), even though he may happen to be the permanent guardian of the infant. But if he is called guardian in the bill, this is no cause of demurrer (*h*).

A bill may be brought by *prochein amy* even in behalf of an infant in *ventre sa mere*, and the Court has granted an injunction in his favour to stay waste (*i*).

If a plaintiff file a bill as an adult, and it is afterwards discovered that he is an infant, leave will generally be given to insert a next friend by amendment (*k*).

The consent of an infant to a bill filed in his name is not necessary, nor is his approbation or disapprobation of the proceedings regarded (*l*).

A plaintiff, who was an infant when the suit was commenced, is generally entitled, on attaining full age, to have his name struck out of the bill, whether he is sole plaintiff or co-plaintiff with others (*m*). His coming of age is no abatement of the suit (*n*), but he may elect whether he will proceed with it or not (*o*). If he goes on with the cause, all subse-

(*d*) An infant may equally be made a ward of Court by the institution of a suit in which he is a defendant, see p. 103, *supra*. Vern. 710; 2 Atk. 117; 3 Atk. 209.

(*e*) *Andrews v. Cradock*, Prec. in Chan. 376; *Anon.*, 1 Atk. 570; 2 P. Wms. 119; 1 Ves. jun. 195.

(*g*) 2 Eq. Cas. Abr. 239; 1 Ves. jun. 195.

(*h*) Wyatt, Pract. Reg. 224.

(*i*) *Lutterel's case*, cited Prec. Cha. 50; see *Mugrave v. Parry*, 2

(*k*) *Flight v. Bolland*, 4 Russ. 298.

(*l*) *Andrews v. Cradock*, Prec. Cha. 376; Stra. 708; *Lyons v. Blentin*, Jac. 259; *Russell v. Sharpe*, 1 J. & W. 432.

(*m*) *Acres v. Little*, 7 Sim. 138; *Guy v. Guy*, 2 Beav. 460.

(*n*) Pract. Reg. 225.

(*o*) 1 Dan. Ch. Pr. 108.

quent proceedings may be carried on in his own name, and the bill need not be amended or altered (*p*).

But where a suit had been instituted for the benefit and protection of two infants, and the Court was of opinion that the object of the suit could not be effected till they both attained twenty-one, it dismissed with costs a petition by the elder on reaching that age, praying that the bill might be dismissed against her, or that she might be indemnified against the future costs of the suit (*q*).

SECTION II.

Reference to inquire whether a Suit is for the Infant's Benefit.

As some check upon the general license to institute a suit on behalf of an infant, if it is represented to the Court that a suit preferred in his name is not for his benefit, an inquiry into the fact will be directed to be made by one of the Masters; and if he reports that the suit is not for the benefit of the infant, the Court will stay the proceedings, or dismiss the bill with costs, to be paid by the next friend (*r*). Proceedings will be stayed, at all events, till the Master has made his report (*s*).

References for this purpose have been made, where it was shewn to the Court that the suit was instituted rather out of pique than any real concern for the infant's benefit (*t*), or where a next friend has ventured to file a bill to see what case is made by the answer, and the answer is such as to shew that the suit ought not to be prosecuted (*u*); but as it is essential for the protection of infants that suits on their behalf should

In what cases such a reference will be made.

(*p*) See the section on Costs, *infra*.

(*q*) *Smith v. Lyster*, 19 L. J. 344.

(*r*) Lord Redesdale, p. 27.

(*s*) *Fos v. Suverkrop*, 1 Beav. 584.

(*t*) *Da Costa v. Da Costa*, 3 P. W. 140; *Whittaker v. Marljar*, 1 Cox, 285.

(*u*) 2 Ves. 466; Jac. 262.

Not made on motion of defendant before answer.

Principles on which Court will judge of propriety of suit.

not be discouraged, such an inquiry ought, according to Sir John Leach, V. C., never to be directed unless there be a strong case of no benefit, or of improper motive (*x*); and it has been held that such a reference ought not to be made on the motion of a defendant before answer (*y*).

The principles upon which the Court will judge of the propriety of a suit have been fully discussed by Lord Chancellor Brougham (*z*); who, after adverting to the great encouragement held out to next friends by the language of judges, expressed his own opinion as follows (*a*):—"The true and just principle which should govern all such cases is this, no discouragement ought to be thrown in the way of persons *bona fide* suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infant's advantage. While they appear to act *bona fide* they will be protected; the presumption will rather be in their favour; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated, and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed; or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the Court can better repose confi-

(*x*) *Stevens v. Stevens*, 6 Madd. 97.

(*z*) *Nalder v. Hawkins*, 2 M. & K. 243.

(*y*) *St. John v. Besborough*, 1 Hogan, 41.

(*a*) See p. 249.

dence. It follows that every such case must depend upon its circumstances; nor will the Court even order an inquiry unless just cause of suspicion exists."

There must be a cause of suspicion.

In the case which gave rise to these observations (*b*), the bill was mainly for the administration of the trusts of the will of the infants' father; the next friend was in very humble circumstances, and a stranger to the family, but evidently acting under the influence of a discarded attorney, and there were various circumstances tending to excite suspicion:—Lord Brougham directed an inquiry whether the suit was for the benefit of the infants, and if so, whether such next friend was a proper person to conduct it, or otherwise, who was a proper person to be appointed next friend in his place (*c*), and the Master was to be at liberty to state special circumstances.

Examples.

Where a suit had been instituted on behalf of infants, against their father's executor, for the usual accounts, and the next friend was a solicitor wholly unconnected with the family; Sir John Leach, V. C., referred it to the Master to inquire whether it would be for the benefit of the infant plaintiffs that the suit should be prosecuted; the defendant undertaking by his counsel to render to the Master upon affidavit the accounts prayed for by the bill (*d*).

This order seems open to the observation, that if the suit was properly instituted, the prayer of the bill might have been granted in the regular way; (the conduct of the suit being given, if requisite, to a new next friend): and upon the coming in of the answer, proceedings might have been stayed, or the bill dismissed; but if the suit was improper, the executor ought not to have been obliged to render accounts which had not been legitimately demanded.

If the next friend interfere with the regular progress of a suit, or show reluctance to proceed in it,—as where he moves

Interference of next friend with progress of suit.

(*b*) *Nalder v. Hawkins*, 2 M. & S. 583.

K. 243.

(*d*) *Richardson v. Miller*, 1 Sim.

(*c*) See *Dick*. 766; *Fox* v. 133.

to discharge an attachment which the solicitor in the cause had taken out in the regular course of process:—this affords ground for a reference to the Master, to see if the cause is a proper cause to go on with, and if it is fit that the next friend should continue in his office (*g*).

Next friend must not apply for such a reference.

The next friend, in commencing a suit, undertakes on his own part that the suit he has so commenced is for the benefit of the infant, and it is not competent for him to apply in the same suit for a reference to determine the point (*h*).

Exception.

But as to a particular suit, which is only subsidiary to another suit subjecting the infant's estate to the management of the Court, or which is unconnected with the principal suit, such a reference may with propriety be made in the principal suit (*i*), and it may also be obtained on behalf of an infant defendant (*h*).

A new bill will be filed, if recommended by the Master.

Where the Master, by virtue of the liberty given him to state special circumstances, certified that the suit in which the reference had been made was not for the infant's benefit, but that a suit differently framed might be instituted with advantage; a new bill having been filed by another next friend in pursuance of this opinion, all the proceedings on the first bill were stayed, but Lord King refused to dismiss it, because it did not yet appear whether the second bill was for the benefit of the infant (*l*). But in cases where the Master's report contains no such recommendation, the bill is dismissed (*m*).

Exceptions do not lie to the report.

Exceptions ought not to be taken to the Master's report on such a reference: such reports are in the nature of cases for the opinion of the Court, and ought to be objected to, if at all, on petition to confirm (*n*).

(*g*) *Ward v. Ward*, 3 Mer. England, 23rd Ap. 1842.
706.

(*l*) *Da Costa v. Da Costa*, 3 P.

(*h*) *Jones v. Powell*, 2 Mer. W. 140.
141.

(*m*) *Whittaker v. Marlar*, 1

(*i*) *Taner v. Ivis*, 2 Ves. 466;
see 1 Dan. Chan. Prac. 97.

Cox, 285; *Fox v. Suerkrop*, 1
Beav. 583.

(*k*) *Formor v. Pomfret*, V.C. of

(*n*) *Whittaker v. Marlar*, ubi

It is to be observed, however, that in a late case of this kind at the Rolls (*o*), exceptions were taken to the report, and were overruled.

Where it is made perfectly clear to the Court, that a bill has been filed not for the benefit of the infant, but purely for the advantage of the next friend; the bill will on motion be dismissed without a reference, with costs to be paid by the next friend: and this will be done on the application either of a party in the cause, or of the infant plaintiff by any one acting as next friend for the purpose of the application (*p*).

In a clear case, bill dismissed without reference,

on application by any one as next friend for the purpose.

But this course will not be pursued in any doubtful case.

Not dismissed in a doubtful case.

Where property had been bequeathed to infants (*q*), and they had remained under the care of their aunt, who was executrix and trustee under the will, their father filed a bill in their name, as their next friend, against the aunt, praying the accounts, and that his children should be placed with him, and a proper sum allowed him for their maintenance. In the course of the proceedings, a motion was made (*r*) on the part of the defendants, that the bill might be dismissed, or that all proceedings in the cause might be stayed. In support of the motion, affidavits were made by two persons who had viewed the estates of the infants, and stated their opinion that they were let at the utmost advantage. They stated that they had inspected the accounts relating to their property, which had been accurately kept, and from which it appeared, that their fortunes had been improved in the most beneficial manner; some portion of their expenses had been defrayed by their aunt herself. A certificate was also signed by the two eldest

Infants' disapp

supra; see pp. 107, 216, *supra*. (*p*) *Sale v. Sale*, 1 Beav. 586; *Contra, Owen v. Owen*, Dick. 310; *Guy v. Guy*, 2 Beav. 460; and but see *Neal v. Billing*, Dick. 93; see *Walker v. Elze*, 7 Sim. 234. *Campbell v. Campbell*, 2 My. & C. 25. (*q*) *Lyons v. Blenkin*, Jac. 245. (*o*) *Fos v. Sucoerkrop*, 1 Beav. 583. (*r*) P. 259.

probation of
suit not re-
garded.

of the infants, expressing their satisfaction with the management of their aunt, and their disapprobation of the suit (*s*).

Lord Eldon said, "I doubt whether, if the bill be proper in its contents, you can come here by motion to stay the suit, upon statements of surveyors or accountants, that it is not necessary;" and his Lordship afterwards observed, "It was said, that this lady had so well managed the property, that it could not have been necessary to file a bill for an account of it. It occurred to me to think, that whatever might be right to be done as to the custody of the children, yet that it would be too much to say that a father should not be at liberty to file a bill, in order to know what the property was which had been left to his children, how much had been applied towards their maintenance and education; how much remained for them; and, in short, what was precisely their situation in respect of the property. It may be, that when the answer of the defendants comes in, it may appear that such a cause ought not to be suffered to go on; but the costs being at the risk of the next friend, if it turns out to be a suit that ought not to have been instituted, the question of costs will then be for my consideration. I do not, therefore, think proper to stay the proceedings. If there is any occasion to apply to the Court to stop this as a vexatious suit, it will then be time enough to consider the question of costs."

A father may
file a bill for
accounts of his
children's
estate.

A similar suit having been instituted by a mother, (the father being dead), the usual accounts were decreed; but misconduct being imputed to the mother, a special reference was made on the subject, and all proceedings under the decree were stayed until the report should be made (*t*); with a view, no doubt, to the substitution of a new next friend, if the circumstances required it.

(*s*) See p. 138, *supra*.

(*t*) *Arnott v. Bleasdale*, 4 Sim. 387.

SECTION III.

Reference to inquire which of two Suits is the more beneficial.

IF two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the Court will, on motion, as a matter of course, direct an inquiry to be made in the same manner, which suit is most for his benefit(u); and which is most proper to be proceeded with. On such a motion, the Court will be satisfied in the first instance with the allegation of counsel, that the two suits are for the same purpose; but if the fact should turn out otherwise, this may be subsequently made the ground for moving to discharge the order for the reference, with costs, to be sustained by the party so improperly obtaining it. The order should give liberty to the Master to state special circumstances. Upon such a reference, it is competent for the Master to point out any improvement that may be made in the form of the suit, or any other circumstance that may be for the infant's benefit(x). All proceedings in both the suits, except such as may be required in pursuance of the reference, are stayed until the Master shall have made his report(y). Objections to the report are considered on petition(z).

Such reference a matter of course.

Order for reference discharged if suits not for same purpose.

Order gives liberty to state special circumstances. Master may suggest improvements.

Proceedings stayed till report.

Where the Master had reported that the first of two suits was more for the benefit of the infant than the second; the plaintiffs in the first suit having presented a petition, praying that the report might be confirmed, and that the proceedings

(u) 1 Ves. 545; 3 Atk. 603; 3 P. W. 140.

Dick. 310; 1 Swanst. 358; 2 Mer. 40; 2 M. & C. 25.

(y) *Fox v. Suerkrop*, 1 Beav. 583.

(x) *Sullivan v. Sullivan*, 2 Mer. 40; and see *Da Costa v. Da Costa*,

(z) *Supra*, p. 368.

in the second suit might be stayed, Lord Langdale, M. R., allowed it to stand over, that a cross petition might be presented by the plaintiffs in the second suit, but ordered them not to proceed in the mean time with the second suit, as to such of its objects as were the same with the objects of the first suit. The cross petition prayed, that the report might not be confirmed, but that his Lordship would declare it to be for the benefit of the infant to prosecute the second suit, and that all proceedings in the first suit should be stayed (*b*).

In what case preference given to later suit.

Next friend may be on terms with accounting parties, if no collusion.

Proceedings will be stayed in suit disproved of.

Not usual to make a reference after decree.

The rules which guide the Court in deciding which of two suits is more for the benefit of an infant, are not capable of being exactly stated; but in a family suit, where a bill has been already filed and another next friend takes upon himself to file a second bill, it is incumbent upon him to shew some defect in the first suit, or that the second is decidedly preferable. If their merits are only equal, the priority must prevail. It is no objection to a suit, that the next friend and the accounting parties are on amicable terms, if there be nothing to lead the Court to suppose that any improper protection is intended to be afforded to the accounting parties; and if there be parties to the cause by whom the interests of the infant will be effectually protected. It is a strong objection to a suit, that a person appears in it as plaintiff, who as an accounting party ought to be a defendant (*c*).

The Court, when it has ascertained which suit will be most for the infant's benefit, will stay proceedings in the other suit (*d*).

Where there are two suits commenced in the name of an infant, in one of which a decree has been made, the other not

(*b*) *Campbell v. Campbell*, Reg. Lib. 1835, A. fo. 312, 349. 28; 1 Ves. 545; 1 Jac. 528; *Campbell v. Campbell*, Reg. Lib. 1835, A.

(*c*) *Campbell v. Campbell*, 2 M. & C. 25. fo. 312, 349. It would seem that *Mortimer v. West* and *Forde v.*

(*d*) *Contra, Owen v. Owen*, Dick. West, 1 Swanst. 358, were creditors' suits. 310; but see Lord Redesdale, p.

having arrived at a decree, it is not usual to make a reference as to which suit is most beneficial; but where there were two such suits, and the second suit was brought first to a decree, and the son of the next friend was appointed receiver; Lord Eldon thought this appointment wrong, conceiving it to be the duty of the next friend to watch the accounts and conduct of the receiver; and he converted the second suit from an amicable into an adverse suit, by giving the conduct of it to the other parties. The next friend in the second suit was discharged, and it was ordered that the next friend in the first suit should be the next friend in the second suit, and that a new receiver should be appointed (e).

Removal of
next friend
after decree.

Neither next
friend nor his
son can be re-
ceiver.

Still less will the next friend himself be permitted to act as receiver (g).

Where two bills had been filed, and it was shewn by affidavit that the next friend in the first bill was a person in the lowest circumstances, and of immoral character, and there were strong grounds for thinking that he had filed the bill, not for the benefit of the infant, but to gratify a spite entertained by himself against one of the defendants; Sir L. Shadwell, V. C., on motion, without any reference, ordered the bill to be taken off the file, with costs to be paid by the next friend (h); and said, "It is impossible that a suit conducted by a person of such a character, can be well conducted. Where a suit is instituted on behalf of an infant, it should be manifest to the Court, that the next friend is likely to conduct the suit for the benefit of the infant. It is reasonably plain, from the facts stated in the affidavits, that the bill in the first cause was filed, not for the benefit of the infant, but to gratify a spite entertained by the next friend against the testator's widow, because she had discharged him from her service. It appears also, that he is a person in low circumstances; and, therefore, there is no security for his being able

One of two
bills taken off
the file without
a reference,
where character
of next friend
bad, and cir-
cumstances
suspicious.

(e) *Taylor v. Oldham*, Jac. 527.

(g) *Stone v. Wishart*, 2 Madd. 64.

(h) *Walker v. Elze*, 7 Sim. 234.

to pay the costs of the suit, in case it should be allowed to proceed, and he should be, ultimately, ordered to pay them."

SECTION IV.

Questions arising as to next Friend, personally.

THE personal character and station of the next friend, and the circumstances under which he appears before the Court, have hitherto been considered only so far as they bear upon the question of the propriety of the suit, if only one bill has been filed; or the comparative merits of the different suits, if there be more than one. We have seen that the objections to a suit may sometimes be removed by the appointment of a new next friend (i); and that the reference to inquire whether a suit is beneficial, may be accompanied with a direction to inquire whether the next friend is a proper person to conduct it, and if not, who is a proper person to be appointed next friend in his place (k); and also that a bill, the main objects of which are not improper, may, where a bill is subsequently filed embracing those objects, be taken off the file, on the ground of the bad character of the next friend and suspicious circumstances attending the institution of the suit (l).

The questions which may arise as to the next friend himself, without reference to the positive or comparative merits of the suit, must next be considered.

Next friend
should be a
person of sub-
stance.

The next friend is primarily liable to the costs of the suit (m). And for this reason it is said, in the older books, that though he need not be a relation, he must be a person of

(i) *Taylor v. Oldham*, *supra*, p. 371; *Peyton v. Bond*, 1 Sim. p. 373.

(k) *Nalder v. Hawkins*, *supra*, p. 367; *Walker v. Elze*, *supra*, p. 373.
(l) *Walker v. Elze*, *supra*, p. 373.
(m) Lord Redesdale, p. 26.

substance (*n*), and a responsible person (*o*); and where the next friend was not sufficient to answer the costs, it is said to have been usual for the Court to order that he should give security for costs, or that another next friend should be named (*p*).

Formerly obliged to give security for costs, where poor, *semble*.

The Court still prefers having a man of substance as next friend (*q*); but whatever may have been the practice in former times, a next friend cannot now be compelled, on the ground of poverty only, to give security for costs.

Not now compellable on ground of poverty.

In the case of *Squirrel v. Squirrel* (*r*), Lord Thurlow doubted whether a next friend ought to be discharged on account of poverty more than a principal. He said that the principle upon which a plaintiff, if poor, would not be deprived of the opportunity of applying to the Court for justice, is similar to that of getting a next friend to sue. Suppose an infant had a father, who was the natural friend to sue for it, would the Court refuse to hear that father? He did not conceive that the Court could inquire into the circumstances of a *prochein amy* more than those of any common plaintiff, in which case, though the plaintiff should be insolvent, a defendant cannot help himself; in the cases of an infant or *feme coverte*, they were obliged to sue by a next friend, in order that there might be some person suable for the costs (which the infant and *feme coverte* themselves are not); but the Court contented itself with making somebody amenable in this respect, without going into an inquiry concerning his ability.

The case of an infant, however, has in later times been observed to differ essentially from that of a *feme coverte*.

Distinction between next friend of infant and of *feme coverte*.

(*n*) *Anon.*, 1 Atk. 370.

(*q*) 1 Sim. 392; 2 M. & K.

(*o*) *Stra.* 709.

248.

(*p*) *Wyatt*, *Prac. Reg.* 349; *Mos.* 86, where infants are not expressly mentioned. See 2 P. W. 297.

(*r*) 2 P. W. 297, n. 1, ed. Cox; S. C. 2 Dick. 765; *Anon.*, 1 Ves. jun. 409, S. C. apparently.

A bill was filed on behalf of a *feme covert* and her infant child, by a person who had seduced the mother, had been long in execution on the suit of the husband and father for adultery, and had taken the benefit of the Insolvent Act. Sir John Leach, V. C., observed, on an application to remove the person in question from being the next friend of the wife, and to substitute a new next friend, that he should hesitate much before he called upon the next friend of an infant to give security for costs, for any person might file a bill in the name of an infant; but that the suit of a *feme covert* is substantially her own suit, and her next friend is selected by her; that the case before him was a gross one, and that he could not permit the suit to proceed on the part of the *feme covert* without security being given for costs. His Honor gave leave to the defendant to apply to stay all proceedings until the next friend should be changed, or security given for costs (*s*).

In accordance with his opinion thus expressed against calling upon the next friend of an infant to give security for costs, Sir John Leach, in another case (*t*), ordered a new next friend to be substituted for a retiring one, and refused to inquire into the circumstances of the new next friend, though it was suggested that he was in indigent circumstances; observing that the person in question would be at liberty to file a new bill without such inquiry.

Sir L. Shadwell, indeed, in *Walker v. Else* (*u*), adverted to the poverty of the next friend; but it has been seen that, although this was an additional and unfavorable circumstance, it was not the ground of the decision.

Security taken where next friend was insolvent and had absconded.

In the old case of *Wale v. Salter* (*x*), on affidavit that the next friend was not worth a groat, and that he had absconded, it was ordered that security should be given for costs.

(*s*) *Pannington v. Alvin*, 1 S. & S. 101.

S. 264.

(*u*) *Supra*, p. 373.

(*t*) *Davenport v. Davenport*, 1 (x) Mos. 47.

Lord Langdale, M. R. (z), where the mother, who was the next friend, was receiving parish relief, refused to compel her to give security for costs, and observed that he was not aware of any instance in which a plaintiff, on the mere ground of poverty, whether suing in his own right, or as *prochein amy*, had been compelled to give security for costs.

Refused where next friend was receiving parish relief.

Where it was stated on affidavit, that the next friend was insolvent, and that he had refused to act as next friend until he had been indemnified from the costs of the suit by some person whose name was not disclosed, and that he had declared that he did not consider himself responsible for the costs:—Sir L. Shadwell, V. C., referred to the case of *Fellows v. Barrett*, and refused (but without costs) a motion to make the next friend give security, observing that he did not think he had authority to make the order; and that the Court rather encourages persons to institute suits on behalf of infants, having this security, that it may refer to the Master to inquire whether the suit is for the infant's benefit (a).

Refused where he was insolvent.

Security against undue institution of infant suits.

A next friend, however, will not be allowed to sue in *formâ pauperis* (b).

Next friend must not sue in *formâ pauperis*.

If the next friend does not proceed properly with a cause, or in any way neglects his duty, this is ground of removal (c).

He may be removed for neglect.

Where it was shewn by affidavit that the interests of the infants' father, who was the principal defendant, were directly opposed to the interests of the infants; that the next friend was a person in low circumstances, brother to the father, and a material witness for him in the cause, and who had been a witness for him in certain proceedings adverse to the party under whom the infants claimed; that the

Next friend dismissed under circumstances suggestive of collusion.

(z) *Fellows v. Barrett*, 1 Keen, 119.

(b) 1 Ves. jun. 460.

(a) *Murrell v. Clapham*, 8 Sim. 74.

(c) *Ward v. Ward*, 3 Mer. 706; *Russell v. Sharpe*, 1 Jac. & W. 482.

solicitor of the infants acted for the father also; that he had been for ten years the father's confidential solicitor; and that it was upon his application that the next friend had undertaken the office:—

Solicitor for
adverse parties
viewed with
jealousy.

Court will ap-
point new next
friend without
a reference.

Sir L. Shadwell, V. C., said, that in family suits, it is proper that the same solicitor should be employed for all parties; but the Court will watch with great jealousy, a solicitor who takes upon himself a double responsibility; and if it sees a chance of his miscarrying, will take care, where the plaintiffs are infants, that he shall not be permitted to stand in that relation to a defendant, under circumstances of very adverse interest. His Honor added, that if it could be tendered to him by affidavit, that a man of substance who was himself unconnected with the parties, and who would employ a solicitor similarly situated, would undertake the office of next friend, he should have no hesitation in making the order without a reference. There being a dispute as to who should fill the office, the uncle was removed, and it was referred to the Master to appoint a proper person in his place (*d*).

A new next friend was appointed by Lord Langdale, without a reference, in the case of *Furtado v. Furtado* (*e*), on the ground, it would seem, of the original next friend having neglected to prosecute the suit properly. This order was made on the motion of the solicitor who had been employed on behalf of the plaintiff by the original next friend; and, as any one may interpose (at the risk of costs) for an infant's protection, the notice of motion which he had served, signed by him as solicitor to the plaintiff, was held, on appeal, to have been regular (*g*).

It is obvious, that in such a case as that of *Pennington v. Alvin* (*h*), the character of the next friend would, apart from

(*d*) *Payton v. Bond*, 1 Sim. 390.

(*g*) 24 March, 1842, *Ibid*.

(*e*) *Furtado v. Furtado*, 9 July,

(*h*) *Supra*, p. 376.

1841; 6 Jurist, 227.

all consideration of his pecuniary circumstances, be sufficient to procure his removal from the conduct of the suit, if any proper person could be found to conduct it.

It seems, that special circumstances in the past conduct, even of a mother, and in her position with regard to the infants, will induce the Court to transfer the management of a suit on behalf of the infants to a new next friend (i).

If the conduct of a suit should appear, as in *Nalder v. Hawkins* (k), to be in improper hands, and no proper person should be willing to become next friend, it is difficult to say what course the Court would pursue.

It appears from the cases which have been mentioned, that bad character, absconding, being under improper influence, collusion, declining or neglecting to proceed actively in a suit, and generally any circumstance tending to excite distrust, such as great disparity of station and means, the absence of any connexion or acquaintance between the next friend and the infant, or violent and irregular conduct on the part of the next friend, will be attentively considered by the Court, and care taken, either by discharging the next friend, or by taking security for costs, that the interests of the infant and of the other parties in the cause, be not exposed to unnecessary risk.

Circumstances which weigh with Court against next friend.

As long as the next friend continues in his office, he is responsible for the conduct of the suit; and if there is no application for his removal, the Court will not, upon the application of an infant party, direct an inquiry, whether the cause has been properly conducted (l).

Next friend, till removed, has the sole conduct of a suit.

But the Court will hear any one on behalf of an infant, provided he will make himself responsible for the costs of his application; for to exclude the intervention of a second next friend, petitioning on behalf of the infant, would be to leave

The Court will hear any one on behalf of an infant.

(i) *Arnott v. Bleasdale*, 4 Sim. 387, *supra*, p. 370.

(l) *Russell v. Sharpe*, 1 J. & W. 482.

(k) *Supra*, p. 367.

the infant unprotected in every case in which the original next friend does not concur in the infant's petition (*m*).

Neither next friend, nor his wife, can be a witness in the cause.

Next friend permitted to retire on giving security for costs already incurred.

His name struck out, in order to make him a defendant.

Reference to inquire whether suit properly conducted.

The next friend sometimes finds it inconvenient to continue in that office, and applies to the Court that another person may be substituted for him. This happens most frequently where he or his wife ought to bear testimony in the cause, for he is considered as so far interested in the event of the suit, that neither he nor his wife (*n*) can be examined as a witness: in such cases, he will be permitted to retire on giving security to the defendant for the costs already incurred (*o*). Where it was necessary to make the next friend a defendant, in order to prove a will against him as heir-at-law, his name was struck out on motion, but it is not said that he was obliged to give security (*p*). In the case of *Melling v. Melling* (*q*), where no reason was assigned for the application, except the next friend's desire to withdraw himself, Sir John Leach, V.C., referred it to the Master to inquire, whether it was for the benefit of the infant that another next friend should be substituted, with liberty to state special circumstances: and he observed, that it might be that the suit was improper, or had been improperly conducted: the next friend was not thus to escape from costs to which he might be liable.

Proceedings on death of next friend.

When the next friend dies pending the suit, the proper course of proceeding appears to be for the solicitor of the plaintiff to apply to the Court for leave to appoint a new next friend in his stead; and after such appointment, the name of the new next friend should be made use of in all

(*m*) *Lyon v. Watson*, L. C., 5th Aug. 1840; *Guy v. Guy*, 2 Beav. 460; *Lord Dudley's case*, *supra*, p. 349.

(*n*) *Head v. Head*, 3 Atk. 511.

(*o*) *Stra.* 708; *Witts v. Campbell*, 12 Ves. 493; *Davenport v.*

Davenport, 1 S. & S. 101. Whether he can be examined for the defendant, see *Bird v. Owen*, *Mos.* 312.

(*p*) *Fowle v. Fowle*, 12 Ves. 493, n., 2nd ed.

(*q*) 4 Madd. 261.

subsequent proceedings in which the former one, if alive, would have been named (*r*).

In a case where the next friend died *after decree* (*s*), and the plaintiff's solicitor refused to name a new next friend, Sir Thos. Clarke, M. R., upon the petition of the defendant, directed an attendance in Court, and ordered that the plaintiff should procure a person to be appointed his next friend by a certain day, or that the defendant should be at liberty to set up or name a proper person as his next friend. In this case, a precedent (*t*) was produced of a similar order made by Lord Hardwicke without directing an attendance. In *Bracey v. Sandiford* (*u*), Sir John Leach, V. C., upon the principle that after a decree the defendant has a right to move in the prosecution of a suit, referred it to the Master to appoint a new next friend.

How new next friend is appointed, if plaintiff declines;—After decree;

Where the next friend had died before decree, Sir Thomas Sewell, M. R., on the authority of *Ludolph v. Szaby*, made an order similar to the order in that case, without directing any attendance (*x*).

—Before decree.

The outlawry of the next friend is no good plea, because he does not claim in his own right, and the real *actor* being the infant, the outlawry in any third person is no exception against him, why he should not *stare in judicio* (*y*).

Outlawry of next friend cannot be pleaded.

(*r*) 1 Daniell, Cha. Pract. 107.

(*u*) 3 Madd. 468.

(*s*) *Lancaster v. Thornton*, Amb. 398; 1 Dick. 346, S. C.

(*x*) *Countess of Shelburne v. Lord Inchiquin*, Amb. 398, n.

(*t*) *Ludolph v. Szaby*, Ibid.

(*y*) Gilb. For. Rom. 54.

SECTION V.

Effect of Suit on Interests of Infant Plaintiff.

Infant plaintiff may have decree upon any matter arising on the state of his case, though not prayed for by the bill.

As the Court takes great care of the interests of an infant plaintiff, in stopping any suit that is not for his benefit, and in removing any next friend who is not likely to conduct it properly; so it shews him especial favour in allowing him to have a decree "upon any matter *arising upon the state of his case*, though he has not particularly mentioned and insisted upon it and prayed it by his bill (z)."

Thus where a bill was brought on behalf of an infant, to have the possession of a family estate as tenant in tail under an old settlement, and for general relief; on an issue the plaintiff's father was found to have been illegitimate; and the plaintiff, waiving his claim to the whole estate, insisted on having the benefit of a certain agreement between his father and his grandfather, under which he would be entitled to *part* only of the estate; Lord Hardwicke held that the agreement was binding, and decreed for the plaintiff on this point (a).

A mother and her infant (b) daughter filed a bill to compel the execution of a settlement which was prepared, but never executed, by reason of the death of one of the parties. On the hearing, it appeared that the settlement so prepared differed materially from the articles on which it was founded, to the prejudice of the plaintiffs. The Lords Commissioners directed a settlement according to the articles, notwithstanding the plaintiffs did not pray relief so beneficial to themselves (c).

(z) 1 Atk. 5.

(b) See Lord Redesd. 39, n. (i),

(a) *Stapilton v. Stapilton*, 1 4th ed.

Atk. 2.

(c) *Durant v. Durant*, 1 Cox, 58.

If a defect appears on hearing of the cause; that is, if it appears that some important matter is not properly included in "the state of the infant's case" upon the record, the Court may order the cause to stand over, with liberty to amend the bill (*d*).

If a defect appears, liberty given to amend.

Where a bill by an infant (*e*) insisted on a certain construction of a settlement, and that, if such were not the legal construction, yet such was the intention of the settlor, (without referring to any articles or instructions); and, upon the hearing, it was proposed to read, on the part of the plaintiff, instructions which had been sent by the settlor; Lord Hardwicke said, that if the bill had been brought to make the settlement agreeable to articles or instructions, and had pointed out those instructions particularly, they might have been read in evidence; that the proper method was, to point out the articles or instructions, though it was not to be laid down as a general rule, that no case can be so circumstanced as to make it unnecessary to point out the articles; as where the settlement itself refers to them. But this being the case of an infant, his Lordship gave him an opportunity to amend his bill, that he might have the benefit of those instructions.

In this case, the instructions were not matter *arising upon the state of the plaintiff's case*, as in *Stapilton v. Stapilton*, and *Durant v. Durant* (*g*).

The Court will not allow any advantage to be taken of the mistakes of those who act for infants. Where an infant, by her own bill, had submitted to pay off a mortgage charged upon lands which had been devised to her, and the Master of the Rolls was of opinion, that the debts ought, according to the will, to be discharged out of a different fund; his Honor refused to bind the infant by this offer, saying that he must take care of her, and not suffer her to be caught by the mis-

Infants not to suffer by mistakes of their agents.

(*d*) Lord Redesd. p. 27, 4th ed.

(*e*) *Pritchard v. Quinchant*, Amb. 147.

(*g*) *Supra*, p. 382.

take of her agent; and he gave her leave to amend the bill (*h*).

An infant having filed a bill for the specific performance of a contract, it was alleged that the plaintiff, by the act of filing the bill, had made the remedy mutual; but Sir J. Leach, M. R., said, that the act of filing the bill by his next friend could not bind him, and dismissed the bill (*i*).

On petition, Court will order whatever is beneficial for infant.

Court will choose for infant between two modes of proceeding.

So, where a petition is presented on the part of an infant, the Court will do what is for the benefit of the infant, without regard to the prayer (*k*).

The Court will elect for an infant, where it is necessary to decide between two modes of proceeding.

If an ejectment bill is brought on behalf of an infant for possession and an account of rents and profits, the Court may elect for him to proceed at law, and retain the bill for the mesne profits; but an adult plaintiff will be obliged to make his election to proceed in equity or at law, and if at law he must proceed for the whole there (*l*).

Leave given to amend by making infant plaintiff a defendant.

A suit which is proper in its objects may be so framed as not to be for the benefit of an infant plaintiff; as, if he be made plaintiff where he ought to be a defendant; and in such cases liberty will be given, on motion, to amend the bill, by striking out his name as plaintiff, and making him a defendant (*m*).

This liberty was given where a bill had been filed on behalf of an infant heir-at-law and younger children, to raise portions, under a settlement, out of real estate which had descended to the infant heir; and the settlement, which had been erroneously proved for him, was ordered to be proved anew against him as a defendant (*n*).

(*h*) *Serle v. St. Eloy*, 2 P. W. Atk. 129. 386.

(*m*) *Tappen v. Norman*, 11 Ves.

(*i*) *Flight v. Bolland*, 4 Russ. 563; *Plunket v. Joice*, 2 Sch. & Lef. 189. 298.

(*k*) 10 Ves. 59.

(*n*) *Plunket v. Joice*, *ubi supra*.

(*l*) See *Dormer v. Fortescue*, 3

Where an infant is introduced into a suit as a plaintiff after it has made some progress, the cause may, if the Master, upon a reference, reports that it will be beneficial for the infant, be heard, as to the infant, upon the pleadings and proofs already made, as if he had been a party from the beginning (*o*).

In the case of a bill brought by any one under age, or on coming of age, to have possession of an estate, and an account of rents and profits, the Court will decree an account from the time when the infant's title accrued; for every person who enters on the estate of an infant, enters as guardian or bailiff for the infant, and no laches can be imputed to the latter (*p*).

Account of profits decreed from time when infant's title accrued.

It seems, that where an infant plaintiff does not reply, it is not (as in the case of an adult) an admission of the facts in the answer; for an infant can admit nothing which is not for his benefit; and, therefore, his not replying does not affect him, but the facts must be proved. This was so ruled by Lord Hardwicke (*q*). But Sir J. Jekyll, M. R., had previously decided (*r*), that in such a case, the answer must be taken to be true, since the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer; and he ought not to suffer by such omission in the plaintiff. The answer seems accordingly to have been read.

Infant plaintiff does not admit facts in answer by not replying.

Where the plaintiffs in a suit, one of whom was an infant, filed a replication, but did not serve subpoenas to rejoin, and afterwards obtained an order to withdraw the replication, on payment of 20*s.* costs; the defendants moved to discharge that order with costs; alleging, that the suit of an infant cannot be heard on bill and answer. Lord Eldon observed, that

Replication by infant plaintiff not indispensable.

(*o*) *Montgomery v. Roilly*, 1 Atk. 130; Prec. Cha. 517; 1 Eq. Bligh, N. S. 391; see *Brookfield v.* Ab. 7.

Bradley, Jac. 632; *Baillie v.* (*q*) *Legard v. Sheffield*, 2 Atk. Jackson, 10 Sim. 167. 377.

(*p*) See *Bennet v. Whithead*, 2 (*r*) *Thurston v. Dechair*, 3 P. W. P. W. 645; *Dormer v. Fortescue*, 3 237, note E.

he could not find it laid down in any book of practice (*s*), that in the case of an infant plaintiff, there must be a replication; that he would have the Registrar's book consulted, to see what difference the infancy of the plaintiff makes; but, that in the case of an adult plaintiff, the order would not be discharged. Eventually, no order was made, so that his Lordship must have been satisfied that a replication is not indispensable in the case of an infant plaintiff. The cases of *Legard v. Sheffield*, and *Thurston v. Dechair*, in neither of which was there any replication, are not alluded to in the report (*t*).

Infant plaintiff bound by decree.

Exceptions.

Bound also by conduct of his agents in the proceedings.

An infant plaintiff, though thus favoured in the course of the suit, is as much bound by a decree, and by all the proceedings in a cause, as a person of full age; and cannot, nor can his representatives, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of courts of justice, as much as any other transactions (*u*). The knowledge of the next friend (if there be no collusion) is the knowledge of the infant; and, generally speaking, the latter is bound by the conduct of his solicitor in the progress of the cause; as where the solicitor permits affidavits to be used in establishing facts against the infant, instead of examining witnesses upon interrogatories (*v*); but not by his default and negligence. Thus, the solicitor of an infant plaintiff having suffered the bill to be dismissed for want of appearing at the hearing, and the order of dismissal to be inrolled; the inrolment was set aside after the plaintiff had attained twenty-one, and he was at liberty to rehear the cause (*x*).

Decree for partition on bill by infant, conveyances respited.

An infant, however, cannot effectually convey his estate; and if there is a decree for a partition upon a bill brought by

(*s*) See 1 Turn. Pr. 84.

v. Duchess of Buckinghamshire, 1

(*t*) *Cowdell v. Tatlock*, 3 V. &

Atk. 631; West, 684, S. C.

B. 19.

(*v*) *Tillotson v. Hargrave*, 3

(*u*) *Gregory v. Molesworth*, 3

Madd. 494.

Atk. 626; *Lord Brook v. Lord*

(*x*) *Kemp v. Squire*, 1 Dick. 131.

Hertford, 2 P. W. 519; see *Sheffield*

an infant, the conveyances on both sides must be respited till he comes of age; for it would be unjust that he should have his estate and partition complete at once, and yet have a legal estate in common with the other parties in their allotment (*y*).

It is not usual to give an infant a day to shew cause against a decree made in a suit in which he is a plaintiff (*z*).

The only case which forms even an apparent exception to the rule is that of *Napier v. Lady Effingham* (*a*), where, upon an appeal from Lord Macclesfield's decree with regard to real estate, the House of Lords gave Sir John Napier leave to shew cause, when he came of age, against his own decree: but, according to Lord Hardwicke (*b*), "the reason the Lords went on there was, that it was for relief on a kind of fraud, and it was to convey the infant's estate. It was, therefore, a very particular case, and not to be argued from."

Apparent exception to the rule against giving a day to shew cause.

Sir John Napier (*c*), an infant, by his *prochein amy*, exhibited a bill against the defendants, as tenant in tail and heir-at-law to Sir Theophilus Napier, to set aside a settlement made by Sir Theophilus Napier on the defendant, Lady Howard of Effingham, during her marriage to Sir Theophilus. The defendant brought a cross bill against Sir John Napier and the trustees, to have a conveyance made to her and her heirs of the estates comprised in the said settlement. Both causes coming to be heard, a decree was made, from which both parties appealed; and it was ordered by the Lords, *inter alia*, that,—as to so much of the decree as ordered Sir John Napier's bill to stand dismissed, so far as the same sought to set aside the settlement,—the decree should be affirmed, with

(*y*) *Lord Brook v. Lord Hertford*, 2 P. W. 510; see *Tuckfield v. Buller*, Ambl. 197; Dick. 241, S. C.; Set. Decr. 276, S. C.; *Agar v. Fairfax*, 17 Ves. 545, 554; *Attorney-General v. Hamilton*, 1 Madd. 214.

(*z*) As to cases of compromise, see *infra*.

(*a*) 2 P. W. 401; 4 Bro. P. C. 340, ed. Toml.; Mosely, 67; see 3 Atk. 626; 2 Atk. 531.

(*b*) West, 684.

(*c*) Mosely, p. 67.

this addition, *unless Sir John should, within six months after his attaining his age of twenty-one years, shew cause to the Court of Chancery to the contrary*; and that the trustees should convey the estates in the said settlement to Lady Howard and her heirs, unless Sir John should, within six months after he should attain his age of twenty-one years, shew cause to the said Court to the contrary.

Sir John came of age, and within the six months preferred his petition (supported by affidavits) to the Lord Chancellor, to bring a new bill, or amend his former bill, and to amend his answer to the cross bill, the causes having been greatly mismanaged to his disservice by his solicitor.

Upon which (*d*), after having adjourned over the same and directed precedents to be searched, his Lordship, assisted by the Master of the Rolls, ordered that Sir John Napier should be at liberty to amend or put in a new answer, and should have time till the first day of the next term, but as no precedent appeared for amending a bill in any points wherein the same had been dismissed on the merits, it was ordered that Sir John should be at liberty to rehear the said causes; and to that end that the original cause should stand over till after the time by the said order given for amending the answer or putting in a new answer was expired. And this order was affirmed by the House of Lords, 1st of May, 1727.

In the case just cited, the same order to which the infant was entitled as defendant in the cross suit, was of necessity allowed him as plaintiff in the original suit; otherwise the settlement would have been affirmed, absolutely in the first suit, and only conditionally in the second (*e*). After the infant came of age, leave was given to him to rehear the original suit; and this is said in Wyatt's Practical Register (*g*) to be the proper course where an infant plaintiff has a day given him to shew cause.

(*d*) January 27, 1726.

(*e*) See 1 Dan. Chan. Pract. 100.

(*g*) Page 225.

SECTION VI.

Of the Costs of a Suit by an Infant.

THE next friend is, as has been already stated (*h*), primarily responsible to the defendant, and to the plaintiff's solicitor, for the costs of a suit. But if an infant by his next friend is plaintiff, and in the end the bill is dismissed with costs, or if costs are given as against the plaintiff at any stage of the proceedings, the question arises, whether those costs are ultimately to be borne by the infant or by the next friend.

Next friend primarily liable.

Question whether costs ultimately to fall on infant or on next friend.

In what case next friend not chargeable.

The rule as laid down by Lord Thurlow (*i*) is this, that no degree of mistake or misapprehension will be sufficient to charge a *prochein amy* with costs; and that any one who will stand forward in that character on the behalf of infants is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit.

According to Lord Hardwicke, if it appears (*k*) that the next friend was sufficiently warranted in bringing the suit, and that it was brought on and continued in a reasonable manner and without laches, then the infant ought to reimburse him. And this is especially the case, where a suit has been carried on under the direction of the Court, (obtained in another suit, by which the infant has been placed under the protection of the Court), and with the approbation of a Master. And this is only reasonable, for next friends must act under great degrees of uncertainty, and upon probabilities; and so must the Masters, who cannot upon a reference hear the other side, but only judge on circumstances *prima facie*, whether it is for the infant's benefit to carry on the suit.

Not where warranted in bringing the suit.

Nor where it has been carried on under the direction of the Court.

(*h*) *Supra*, p. 374.

(*k*) *Taner v. Ivie*, 2 Ves. 466;

(*i*) *Whittaker v. Marlar*, 1 Cox, Dick. 168; *supra*, p. 368.

Thus, if there were a bill to establish the custom of a manor; the evidence of such customs being very uncertain, the Master could only go upon probabilities, the bill might be dismissed; and if the next friend were to bear the costs, nobody would undertake the management of such an estate.

Lien of solicitor on fund in Court.

Where money had been recovered in a suit and secured in Court for the benefit of the infant plaintiffs, and the defendant ordered to pay the costs; the defendant having run away, the solicitor for the plaintiff moved the Court to have his bill of costs paid out of the fund in Court. The next friend, who was the father of the infants and very poor, joined in the application; and Lord King granted it, but with some reluctance (*l*). But it seems that a solicitor who obtains possession of papers, as next friend, has not any lien upon them by virtue of such possession (*m*).

Costs given to person who had acted in effect as next friend.

A case (*n*) has occurred in which a person, suing as to part of a suit in her own right, and partially failing, but also praying for certain accounts which were right and proper to be taken of an estate in which infants were interested, was allowed her costs, as having been in effect in the situation of a next friend to the infants, though she was plaintiff and they were defendants.

Next friend liable where suit improper.

But the same principle which guides the Court in encouraging an honest next friend, that is, the anxiety to have the affairs of infants properly taken care of, will involve in the expenses of his own proceedings (*o*), any one who acts dishonestly, vexatiously, or with wilful negligence, either in the institution or in the conduct of a suit.

Where dismissed after reference;

Thus, the next friend has been ordered personally to pay the costs where the Master had reported the suit to be im-

(*l*) *Staines v. Maddox*, Mos. 319. 87 ed. 1840.

(*m*) *Montagu on Lien*, 53; cited 1 Dan. C. P. 111.

(*n*) *Thompson v. Sheppard*, 2 Cox, 261; see Beames on Costs,

(*o*) *Whittaker v. Marlar*, 1 Cox, 285; see *Lyons v. Blunkin*, *supra*,

p. 369.

proper, and the Court found no evidence of circumstances affording any excuse for its institution (*p*).

So, where upon a reference to inquire which of two suits was most for the interest of the infants (*q*), the Master reported in favour of the earlier suit, and the Master of the Rolls made an order confirming the report; the case having been brought before Lord Chancellor Cottenham on appeal, his Lordship dismissed the appeal with costs, and he made no order as to paying any costs out of the infants' property, thus throwing the burden on the next friend in the second suit.

It need hardly be stated that the next friend is made to pay the costs, when the case is so strong as to induce the Court without a reference to dismiss the suit as improper (*r*).

The next friend has been ordered to pay the costs of an improper application in the course of a suit, the suit itself not being improper (*s*).

An infants' bill having been dismissed with costs as against some of the defendants, upon a fact which was not known when the bill was filed, Lord Eldon declined to allow the costs to the next friend out of the estate of the infants; but reserved the consideration of costs till the hearing, and intimated that if it should turn out that the next friend might with reasonable diligence have satisfied himself of the fact in question, the infants were not to be charged with the expense of his negligence (*t*).

A bill having been filed by an infant for the specific performance of a contract, Sir John Leach, M. R., observed, that such a suit was unprecedented, and he dismissed the bill with costs to be paid by the next friend (*u*).

or without reference.

Liable for improper proceedings in course of suit.

Liable where bill wholly or partially dismissed on the merits.

(*p*) *Whittaker v. Marlar*, *ubi supra*; *Fox v. Suverkrop*, 1 Beav. 583.

(*q*) *Campbell v. Campbell*, 2 My. & C. 25.

(*r*) *Walker v. Elze*, *supra*, pp. 369, 373; *Sale v. Sale*, and *Guy v. Guy*, *supra*, p. 369.

(*s*) *Buckly v. Buckeridge*, Dick. 395; *Buckton v. Buckton*, Dick. 794; *Roddam v. Hetherington*, 5 Ves. 91.

(*t*) *Pearce v. Pearce*, 9 Ves. 548.

(*u*) *Flight v. Bolland*, 4 Russ. 298; see *Capes v. Hutton*, 2 Russ. 357.

Prochein amy not allowed costs in suit caused by himself.

A *prochein amy* having in his hands a sum of money belonging to an infant, refused to pay it to the trustee of a settlement, to whom he might have paid it; and instituted a suit to have the sum secured for the infant, on a suggestion that the father had claimed to have the interest paid to him for the maintenance of the child: the *prochein amy* was not allowed his costs (*x*).

Next friend primarily liable, though his name had been used without his sanction.

Where (*y*) a bill had been dismissed with costs to be paid by the next friend, and on the part of the next friend a written acknowledgment by the solicitor in the cause was produced, whereby he avowed having instituted the suit without the privity of the next friend: the Lord Chancellor refused to direct the solicitor to pay the costs, being of opinion that in that stage of the business the Court could not take notice of the question as between the next friend and the solicitor, but must take it to be the act of the next friend, who ought to make a direct application against the solicitor, if he had acted improperly.

Plaintiff withdrawing from suit, on coming of age, must give undertaking for costs.

It is now necessary to consider the question of costs, where the infant, on coming of age, abandons the suit.

In a case (*z*) where a cause was brought to a hearing, and the next friend died, and soon afterwards the infant came of age, but did not proceed any further in the suit, and the cause was set down solely on the question of costs: Lord Chancellor King, in the first instance, dismissed the bill with costs, thus, (as he said), giving the defendant his election whether he would sue the infant or the next friend for such costs. But on a re-hearing, he dismissed the bill without costs.

It is now the established practice, that where a bill is filed in the name of an infant, he may abandon the suit when he comes of age, and may then move to have his name struck out of the bill (*a*); but he cannot compel the next friend to

(*x*) *Ellis v. Ellis*, 1 Russ. 368.

(*z*) *Turner v. Turner*, 2 P. W.

(*y*) *Whittaker v. Marlar*, 1 Cox, 297; S. C. Stra. 708.

235; see *In re Wheelers*, 2 Molloy, 251. (*a*) *Acres v. Little*, 7 Sim. 138.

pay the costs, unless it be established that the bill was improperly filed: and the bill will be dismissed, upon the late infant plaintiff giving an undertaking to pay "the costs, and the costs of the next friend (b):" the next friend being primarily answerable to the defendant.

Unless suit improper, when paid by next friend.

But where a suit had been improperly instituted on behalf of two infants, and one of them attained twenty-one before decree; her name as co-plaintiff was struck out on her application, with the costs of the application, to be paid by the next friend (c).

As to the principle on which the costs of the next friend are to be computed, the authorities are not entirely in unison.

How the costs are to be estimated.

In the case of *Osborne v. Denne* (d), a person who had filed a bill in his own right, and also on behalf of an infant, applied to have his costs as next friend beyond the taxed costs; but Sir William Grant, M.R., refused the application. Lord Eldon, however, in a subsequent case (e), where trustees had applied for costs as between attorney and client, observed that where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions, he is entitled not only to his costs, but also to his charges under the head of just allowances; and he intimated a strong opinion, that the next friend of an infant is similarly entitled, as the infant himself cannot incur charges and expenses (g).

Costs, as between the infant plaintiff and the defendant, are generally given much upon the same principle as in suits by adult parties.

- (b) *Anon.*, 4 Madd. 461; see 1 Dan. Cha. Pr. 108.
 (c) *Guy v. Guy*, 2 Beav. 480.
 (d) 7 Ves. 424.
 (e) *Fearns v. Young*, 10 Ves. 184.
 (g) Dickens's report of the case of *Tanner v. Ivis*,—"the *prochein amy* was allowed the costs *he paid*"—seems to be in accordance with this opinion; see *Amand v. Bradbourne*, 2 Cha. Ca. 138; *Stewart v. Hoare*, 2 Bro. C. C. 662; *Crump v. Baker*, 18 Ves. 285.

Infant heir impeaching will pays costs.

It is said, that if a bill is brought by an infant heir to dispute a will, and the bill is dismissed, the plaintiff should pay costs (*h*).

Costs against heir of mortgagor acting vexatiously.

Where the heir of a mortgagor filed his bill (*i*) to redeem, and the mortgagee had expended a large sum in a successful defence to an action at law, brought on behalf of the heir during his minority, with a view to defeat the mortgage by setting up an entail;—the mortgagee was allowed, in taking the accounts, the whole sum which he had expended in his defence at law, though it amounted to double the sum which had been allowed on taxation in the action (*k*).

Suit by infant, specific legatee, his legacy to bear costs relating to guardian, &c.

A bill having been filed on behalf of an infant to whom a specific legacy was given by the will, the personal estate not specifically disposed of was decreed to bear the costs of all parties, except so much as related to the orders of reference and reports of a guardian and maintenance for the infant plaintiff, which was directed to be paid by sale of part of his specific legacy (*l*).

Bill by infant for legacy; no costs allowed, unless suit necessary.

Before the Legacy Act (*m*), an infant legatee was entitled to file a bill against the executor, and he could not safely pay the legacy without a decree; and the costs of all parties were given out of the testator's estate. But now the executor may, under that act, pay the legacy into Court, and the infant, when he comes of age, may petition for it: consequently he cannot have his costs if he files a bill for the legacy (*n*), unless there be something either (*o*) in the will, or in the conduct of the executor, to render a suit necessary (*p*).

(*h*) *Blinkehorne v. Feast*, Dick. pp. 274, 275, *supra*. 153.

(*i*) Whether during infancy or not, is not stated. (*n*) *Whopham v. Wingfield*, 4 Ves. 630; *Anon.*, Mos. 5.

(*k*) *Ramsden v. Langley*, 2 Vern. 536. (*o*) *Wilson v. Brownsmish*, 9 Ves. 180.

(*l*) *Barton v. Cooke*, 5 Ves. 461. (*p*) See further, Beames on Costs, p. 71, 2nd ed.

(*m*) 36 Geo. 3, c. 52, s. 32; see

CHAPTER XXXIII.

SUITS IN EQUITY AGAINST INFANTS.

SECTION I.

Appointment of Guardian ad litem and putting in Answer.

A BILL may be filed against an infant, as it may against a person of full age (*a*), and it is no excuse, where there has been unusual delay in prosecuting a demand, to say that there has been infancy on the part of those against whom the demand is made (*b*).

Bill may be filed against infant.

Lord Hardwicke supposes (*c*) a case where a guardian having the infant in his custody, conceals, and will not produce him, but sets up a title to himself, and the infant is the person suggested to have right to controvert that title. "In such a case, and so charged," said his Lordship, "I will not say but a bill of interpleader might be brought, and to compel the guardian to produce him."

Where a bill of interpleader may be filed against infant and guardian.

And where nothing is desired except to obtain the protection of the Court for an infant, it is frequently convenient to make him a defendant to the bill filed for this purpose (*d*).

Where a suit is instituted against an infant, his infancy is not noticed in the bill unless it be a material fact in the cause,

Infant served with subpoena; must appear.

(*a*) Tothill, pp. 169, 161, 172, 2 Ves. jun. 11; S. C. 4 Bro. C. C. 173.

115.

(*b*) Per Lord Commissioner Ashurst, in *Jones v. Turberville*, (*c*) 1 Ves. 249.

(*d*) See p. 384, *supra*.

and he is served with the subpoena, and must appear in the usual way (*d*).

Where a female infant who was born pending a suit, was a necessary party to it; and her parents, in order to interpose difficulties in the way of prosecuting the suit, had refused to have her baptized; it was ordered that she should be described in the subpoena as the youngest female child of her father and mother (*e*).

Solicitor must not enter appearance without authority.

A solicitor ought not to take upon himself to appear for an infant without some authority from the infant's friends. Where a solicitor without any instructions had caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the solicitor to pay the costs (*g*).

Court appoints guardian *ad litem*;

After an appearance has been entered for the infant, the Court appoints a guardian to conduct his defence, who is usually his nearest relative, not concerned in point of interest in the matter in question (*h*). This person is called guardian *ad litem*; his duties are limited to the particular suit, and he has none of the powers or liabilities of a permanent guardian. He may be appointed on the motion either of the plaintiff or of the defendant (*i*).

on motion of plaintiff or of defendant.

(*d*) The 23rd order of August 1841, by which the plaintiff is relieved from the necessity of calling for an answer from parties against whom no relief is sought, does not apply to infants; for its object is to leave the propriety of taking part in the suit to the discretion of the party, and therefore infants, who can exercise no discretion, must answer for the purpose of submitting their interests to the protection of the Court; see Daniell on the New Orders, 53. It was held at first, that to support a motion, under the 24th order, evidence

should be given that the party, served with a copy of the bill, is not an infant. *Goodwin v. Bell*, 1 You. & C. N. C. 181: but this decision has been overruled. *Haigh v. Dixon*, 1 Hare, 317, n.; *Welch v. Welch*, 6 Jurist, 599.

(*e*) *Eley v. Broughton*, 2 S. & S. 188.

(*g*) *Richards v. Dudley*, M. R., 1837; 2 Dan. C. P. 1.

(*h*) Lord Redesd. 103.

(*i*) *Williams v. Wynn*, 10 Ves. 159; *Paul v. Jarratt*, 1 Smith, Ch. Pr. 256; *Hancock v. Bannister*, Ibid. 257.

By this guardian the infant of whatever age, sex, or condition (*k*) puts in a demurrer, plea, or answer; for, without the guardian the defence would be irregular, and he is responsible for the whole conduct of it. The plea or answer is always on the oath of the guardian (unless the oath be dispensed with by consent); and he is *primâ facie* liable for the costs of the suit, and is also personally liable for the costs if the answer be reported scandalous or impertinent (*l*).

Infant answers by guardian *ad litem*.

Defence without guardian irregular.

Guardian liable for costs.

The practice as to the appointment of guardians *ad litem*, and the putting in of answers on behalf of infants, is as follows (*m*):—

Practice as to appointment of guardian, and putting in answer.

If the cause is a town cause, that is, if the infant defendant resides within twenty miles of London, a guardian may, after appearance (*n*), be appointed any day in term or vacation, in Court, by the Lord Chancellor or any of the other judges of the Court of Chancery.

I. In a town cause. After appearance; appointed in Court.

The infant and the intended guardian personally attending, the clerk in court for the infant delivers to the registrar a note containing the title of the cause, and praying that C. D. (naming the person) may be appointed guardian to A. B. the infant, by whom he may answer and defend the suit. The registrar mentions it to the Court, and the person offering himself as guardian appearing, upon examination, to be a proper person, the appointment is made of course. The registrar who attended on the day when the appointment was made, will, upon application, draw up and pass the order, which is to be entered and served upon the adverse clerk in court like other orders of course.

After the guardian has been appointed, he must attend at the public office and swear to the answer or (if necessary) to

The guardian must put in the answer or plea on oath.

(*k*) Tothill, p. 159; "Moore contra Dom' Greenville; will not answer because a *feme covert* and within age;—compelled, 11 Car."

(*m*) Hinde, C. P. 240, *et seq.* see Daniell, C. P. c. iv. s. 7; 1 Smith, C. P. c. 11.

(*n*) *Supra*, p. 396.

(*l*) Hinde, Cha. Pr. 240.

the plea, which he thinks proper to put in on behalf of the infant: and his oath may be taken, though the answer or plea cannot be filed before the order appointing him guardian is drawn up.

Guardian co-defendant need only sign once.

If an answer be the joint answer of an infant defendant and of an adult co-defendant, who is guardian *ad litem* to the infant, the adult defendant need only sign it once (n).

Oath dispensed with by consent.

But the answer is frequently taken without oath, by consent, upon motion or petition; and in that case, the order made upon such motion or petition must be drawn up, passed, and entered, and left with the defendant's clerk in court. The answer cannot be taken without oath under an order obtained for that purpose, before the appointment of a guardian has taken place.

II. In a country cause.

In a country cause, when the infant and the guardian both reside above twenty miles from London and can conveniently meet; if the answer is to be put in upon oath in the usual way, an order must be obtained for a commission to assign a guardian, and to take the answer of the infant by such guardian.

Commission to assign guardian, and take answer.

The order is made of course on motion or petition, and when drawn up, is left with the clerk in court; the writ is sealed, and notice of execution served, in the same manner as the *dedimus* to take the answer of an adult defendant.

Execution of the commission.

Two of the commissioners must attend to open the commission, and the infant being produced, and the proposed guardian (who is also present) appearing upon inquiry to be a proper person, they appoint him guardian to the infant, to answer and defend the suit. The guardian after his appointment exhibits his answer on behalf of the infant, and is duly sworn or affirmed by the commissioners to the truth of it.

Commission to assign a guardian.

In a country cause, if the proposed guardian reside in London, and the infant in the country; or if they both reside in the country, and the answer is to be taken without oath, a

(n) *Anon.*, 2 J. & W. 553.

commission *to assign a guardian only* will be sufficient. This commission is made out *ex parte*, and the order is not served. It is executed in the manner already described, except that the guardian's presence is dispensed with.

The guardian thus appointed, if he lives in London, must attend at the public office with the certificate of his appointment, and swear to his answer, already engrossed and stamped.

How guardian, thus appointed, swears his answer; when he lives in London.

Where the infant and guardian both reside in the country, and cannot conveniently meet, and the answer is to be put in upon oath, the guardian may be appointed by commission, and after the certificate of appointment is returned, the answer may be taken in the country, under a commission (*o*) to take the infant's answer by his guardian already assigned.

How, where he lives in the country.

Commission to take answer.

It seems that such a commission may now be taken out without order, though formerly it could not be made out by the clerk in court without an order first obtained for that purpose (*p*).

Where the infant and the guardian both reside in the country, and cannot conveniently meet, and the guardian's oath is dispensed with, the answer is brought to the defendant's clerk in court, with the order for taking it without oath, the date and import of the order are inscribed on the record, and the answer is filed of course, with the certificate of the guardian's appointment annexed.

Answer taken without oath.

But these rules of practice are relaxed where the circumstances of the case seem to require it.

Rules relaxed, if necessary.

Thus, where an infant lived in town, on affidavit of danger to his health from bringing him into Court to have a guardian assigned, a commission was ordered for the purpose (*q*).

Guardian appointed for infant in London by commission;

(*o*) It is no objection to a commissioner to take an answer that he is under twenty-one years of age, provided he is of sufficient age to take an oath. *Prac. Reg.* 117;

2 *Dan. C. P.* 283.

(*p*) Order ix. 21st Dec. 1833; see 1 *Dan. C. P.* 234.

(*q*) *Duke of Marlborough v. Duchess of Marlborough*, *Dick.* 74.

—in Court,
without com-
mission, or in-
fant's presence.

In a cause where three of the defendants were infants, two of them appeared in Court, and had a guardian (their mother) assigned, to put in their answers; but the third, from illness, could not attend the Court. On an affidavit of the infant's medical attendant as to his illness, his mother was appointed his guardian, to put in his answer, without either his presence in Court, or a commission (r),

Infant out of
the jurisdiction;
— commission
to appoint
guardian.
Where dis-
pensed with.

Where an infant defendant does not reside within the jurisdiction, the general course is to issue a commission for the appointment of a guardian. But, where the infant has a parent or testamentary guardian not interested in the suit, a commission is not necessary if the plaintiff does not insist upon it.

Thus, where an infant resided abroad, and affidavits were made as to this fact, and that the infant's father was not interested in the matters in difference in the suit, Lord Eldon ordered, on motion, (the plaintiffs consenting), that the father should be assigned guardian of the infant for the purpose of putting in his answer; and the report states that several similar orders were produced by the registrar (s).

Lord Eldon, indeed, subsequently refused a similar application (t), after consulting the registrar, who said there was no instance of such an order; but it seems clear, that, if the case of *Jongsma v. Pfiel* had been mentioned, his Lordship must have followed it. On the authority of that case, Sir John Leach, V. C., ordered, on motion, (with the consent of the plaintiffs), that the guardian who had been appointed by commission to put in the answers of infant defendants residing abroad, to the original bill, should also put in their answers to a supplemental bill (u). It has, indeed, been re-

(r) *Hill v. Smith*, 1 Mad. 290; *Abergavenny*, Dick. 31.
see *Knight v. Knight*, 1 Smith, Ch. (t) *Tappen v. Norman*, 11 Ves.
Pract. 256. 563.

(s) *Jongsma v. Pfiel*, 9 Ves. (u) *Lushington v. Sewell*, 6 Mad.
357; see *Lord Howard v. Lord* 28.

marked, that this order was unnecessary, the appointment of a guardian in the original suit being a sufficient appointment for any supplemental or revived suit (x).

In a recent case before Lord Langdale, M. R., a guardian *ad litem* to some infant defendants resident out of the jurisdiction, was (in order to save the expense of a commission) appointed on motion, upon proof of her respectability, and that she had no interest adverse to that of the infants (y).

Where an infant defendant is in custody under some other authority than that of the Court of Chancery, *Habeas Corpus* will be granted on motion (but not on petition) to bring him into Court to have a guardian assigned (z).

How guardian assigned to infant in custody (not of Court of Chancery).

SECTION II.

Appointment of Guardian and putting in Answer, where there is Contempt of Court.

THE practice of the Court where an infant defendant neglects to appear, or if he appears, but neglects to have a guardian assigned, has been settled by the second of the Orders of April, 1842, which provides;—That, upon default by an infant defendant in not appearing to, or not answering the bill, the Court may, upon motion, order that the senior six clerk not towards the cause may be assigned guardian of such infant defendant, by whom he may appear to and answer, or may answer the bill and defend the suit, upon the Court being satisfied that such defendant is an infant, and, if the infant has not appeared, that the subpoena to appear to and answer the bill was duly served, and (whether the infant

Six clerk may be appointed guardian.

(x) 1 Smith, Ch. Pr. 257. (y) *Smith v. Palmer*, 3 Beav. 10.

(z) *Horne v. Lanoy*, Dick. 170.

has appeared or not) that a notice of such motion was (after the expiration of the time for appearing to or answering the bill, and at least six clear days before the hearing of such motion) served upon or left at the dwelling-house of the person with whom or under whose care such infant defendant was at the time of serving the subpoena, and was also served upon or left at the dwelling-house of the father or guardian (if any) of such infant, where the person with whom, or under whose care, the infant was at the time of such service, shall not be the father or guardian of the infant, unless the Court, at the time of hearing such motion, shall think fit to dispense with such last-mentioned service.

Former practice.

The practice, as it stood before the Order, may be stated as follows; the present tense being, for the sake of convenience, employed :—

The infant's neglect, after *subpoena*, to appear, or to have a guardian assigned, amounts to contempt, for which he may be attached (a). But if the parent or other person in whose custody he is, secretes him so that he cannot be served with the *subpoena* to appear, service of the *subpoena* upon such person is sufficient, and the plaintiff is then at liberty to sue out an attachment against the infant to compel him to appear (b).

Proceedings for contempt.

The attachment, whether for not appearing, or for not answering, is usually sealed, but not executed; and, as soon as it is sealed, but before it is returnable, the plaintiff is at liberty to move for a messenger to bring the infant into Court, and when he is brought there, if no fit person offer to be guardian, the Court usually assigns the senior six clerk, not towards the cause, to be guardian; by whom he may

Six clerk assigned guardian.

(a) *Savil v. Slingsby*, Hil. 7 Car., Tothill, 77.

(b) *Baker v. Holmes*, Dick. 18; *Smith v. Marshall*, 2 Atk. 70; *S. C. Garnum v. Marshall*, Dick. 77; *Thompson v. Jones*, 8 Ves. 141. In *Lloyd v. Lloyd*, V. C.

Knight Bruce required (in addition to the statement that the father refused to say where his son was) proof of the age of the infant (11), and that his usual residence was with his father; see 11 L. J. N. S. 109.

answer and defend the suit (c). The infant is then discharged, he cannot be kept in custody after a guardian has been assigned (d).

In a late case, the production of the infant was dispensed with: an infant defendant having appeared, but not having put in her answer, a messenger had been ordered to bring her into Court, in order that a guardian might be assigned. The messenger's return stated, that the infant was secreted by her mother. The Vice-Chancellor, Sir L. Shadwell, ordered the senior six clerk to be appointed guardian, without the infant being produced (e).

Production of
infant dispensed
with.

An infant peer, if he is in contempt, is not brought in to have a guardian assigned him, but his lands may be sequestrated (g).

Sequestration
against infant
peer.

The Court will aid a plaintiff, where undue advantage is taken of the absence of an infant defendant out of the jurisdiction.

Plaintiff aided,
where infant
out of the juris-
diction.

A copyholder by will charged his lands with payment of his debts; the lands lay in England, but the heir was an infant, and lived in Scotland: a bill was brought against him for the satisfaction of the debts out of the copyhold estate, to which he appeared, but was in contempt for not answering. Lord King, C., ordered that the defendant should answer by a certain day, or shew cause why process of sequestration might not issue against him as if he were of full age, or why a receiver should not be appointed of the premises (h).

Sequestration
of infant's land.

Receiver.

So, in modern times, the rule against assigning a guardian on motion for an infant residing abroad, has been dispensed with in favour of a plaintiff who was unable to proceed with

Guardian as-
signed, on mo-
tion of plaintiff,
for defendant
abroad.

(c) Pract. Reg. 223; Hinde, Ch. Pr. 240; *Langley v. Mark*, Cary, 287. 88; *Smith v. Edwardson*, Dick. 234; *Eyles v. Le Gros*, 9 Ves. 12; *Shelley v. —*, 13 Ves. 56; *Wilson v. Bott*, 1 Price, 62; 3 Moll. 27; 7 Sim. 148, n.

(d) *Perkins v. Hammond*, Dick. 287. (e) *Steed v. Calley*, 7 Sim. 148. (g) *Anon.*, 2 Ch. Ca. 163; see *For. Rom.* 206. (h) *Leg v. Turnbull*, 2 P. W. 400.

his suit for want of the answer of an infant residing abroad, and, on his application, the Court has appointed a guardian *ad litem* (i). In the case of *Hancock v. Bannister* (j), the senior six clerk was, by an order made upon notice, appointed to put in an answer for an infant defendant who had been removed by his parents to America.

Infants not within 8th or 21st Order of Aug. 1841.

Infant defendants are not within the eighth of the Orders of August, 1841, by which, when the defendant omits to appear within eight days after service of subpoena, the plaintiff may obtain leave to enter an appearance for him (k); nor are they within the 21st Order, by which, when the defendant omits to plead, answer, &c., in due time, the plaintiff is enabled to file a traversing note (l).

SECTION III.

Proceedings in the Suit.

Answer expressed as made by guardian; may be a mere form.

Formal parts omitted in infant's answer.

The reason.

THE answer of an infant is expressed to be made by his guardian; it need be no more than a mere form, submitting his rights to the protection of the Court (m), which always proceeds with especial caution where the interests of infants may be affected (n); and the general saving at the beginning, together with the denial of combination (o), and the traverse at the conclusion, common to all other answers, are always omitted. For an infant is entitled to the benefit of every exception which can be taken to a bill, without expressly taking it; he is considered as incapable of the combination charged in the bill, and his answer cannot be excepted to for

(i) *Paul v. Jarratt*, 1 Smith, Ch. Pr. 256.

(j) *Ibid.* 257.

(k) *S. W. Railway Co. v. Pooley*, 6 Jurist, 455; see p. 396, *supra*, n. (d).

(l) *Emery v. Newson*, 10 Sim. 564.

(m) 3 Molloy, 27; 2 Beav. 454.

(n) 1 J. & W. 168.

(o) The charge of combination, however, is now frequently omitted.

insufficiency (*p*). Even where the plaintiff has to shew cause against dissolving an injunction restraining an action at law by the infant, unless he can do so upon the merits according to the answer, the injunction will be dissolved; for however insufficient the answer may be, he cannot, by taking exceptions, compel a discovery from the infant; even if the bill contains a charge that books and documents have come into the infant's hands (*q*).

Answer cannot be excepted to for insufficiency.

The rule is, that infants may state anything they mean to prove, but cannot be themselves called upon to answer further (*r*).

Infant may state anything he means to prove.

It may, however, be very much for the benefit of an infant that his answer should state the facts which are intended to form his defence; as he may thus be enabled to go into evidence as to matters which would not otherwise be in issue in the cause (*s*); for it has been held, that evidence cannot be read, even on behalf of an infant, as to facts not stated in the bill, unless they are put in issue by the infant's answer (*t*). And though the infant's answer may be a mere form, it is the duty of the counsel who appears for him to defend his interest, and to call the attention of the Court to his rights (*u*).

Cannot go into evidence as to matters not put in issue.

An infant's answer cannot be read in evidence against him, because in reality it is not the answer of the infant, but of the guardian, who is sworn, and not the infant; and the infant may know nothing of the contents of the answer put in for him by his guardian, or may be of such tender years as not to be able to judge of it (*x*). The plaintiff is

Answer cannot be read against infant.

Plaintiff must

(*p*) Lord Redesd. 314; *Strudwick v. Pargiter*, Bunb. 338; *Copeland v. Wheeler*, 4 Bro. C. C. 256; *Savage v. Carroll*, 1 Ba. & Be. 553; see 1 Dan. C. P. 240.

(*q*) *Lucas v. Lucas*, 13 Ves. 274. *Strudwick v. Pargiter*, *ubi supra*. But he ought not, on account of this objection, to be left out of any suit to which he is properly a party. *Hardcastle v. Shafto*, 1 Anst. 77.

(*r*) Per Richards, C. B., 5 Price, 398.

(*s*) See *Holden v. Hearn*, 1 Bear. 455.

(*t*) *Powys v. Mansfield*, 6 Sim. 565.

(*u*) 3 Molloy, 27.

(*x*) *Eccleston v. Petty*, Carth. 79; see 3 P. W. 237; 1 Ba. & Be. 553.

prove his case
against infant.

therefore compelled to prove against an infant defendant, independently of the infant's answer, the whole case on which he relies; and in order to do so, he ought in general to reply to the answer, and to go into evidence (y).

Replication.

Where it is un-
necessary.

But if the answer contains any admission which it is expressly for the benefit of the infant to make, as where an infant claims an interest under the same instrument as the plaintiff, if such instrument is not adverse to any other interest which the infant, but for its existence, might have in the subject-matter of the suit; as where the plaintiff claims as devisee of real estate, and the infant defendant claims also under the same will, but is heir-at-law to the testator; no further proof is necessary as between the plaintiff and the infant, and the cause may without replication be set down on bill and answer (z).

Facts to be
proved, not-
withstanding
admissions in
answer.

Where the bill stated a defendant to be out of the jurisdiction, and this was admitted by the defendants, some of whom were infants, proof of the fact was still held to be necessary (a).

Deed proved
for infant as
plaintiff, must
be proved
against him as
defendant.

Where it was found necessary to amend a bill by striking out the name of an infant plaintiff and making him a defendant, a settlement which had been erroneously proved for him, was ordered to be proved anew against him as a defendant (b).

Evidence taken
before the in-
fant was a party
to the suit,
cannot be read
against him.

A bill was filed, and after the plaintiffs had gone into evidence, they added parties by amendment, and some of the new defendants were infants. The Court refused to order the evidence upon the original bill, to be read on the hearing against the infant defendants (c).

Accounts taken
before infant
was party may
be adopted if
beneficial to
him.

Where an infant is brought before the Court by supplemental bill after accounts have been taken and a report made, the infant is not bound by the decree or orders or the accounts taken under them, and is strictly entitled to have the

(y) 2 Eq. Ca. Ab. 237.

(z) 1 Dan. C. P. 240.

(a) *Wilkinson v. Beal*, 4 Mad.

(b) *Plunket v. Joyce*, 2 Sch. & Lef. 159, *supra*, p. 384.

(c) *Quantock v. Bullen*, 5 Mad.

accounts taken again; but the decree ought to direct the Master to adopt the accounts already taken, so far as he shall think beneficial for the infant (*d*).

Facts cannot be stated so as to bind infants, in a case sent out of Chancery for the opinion of a court of law, and on this general ground, Lord Eldon refused to direct a case on the legal effect of a will, where the question was whether a defendant had not incurred a forfeiture affecting himself and his infant issue, [who were not parties to the cause] (*e*).

Infants not bound by statements in case for court of law.

If any of the defendants in a foreclosure suit be under age, a decretal order under 7 Geo. 2, c. 20, s. 2, cannot be made, for an infant cannot admit the plaintiff's title as required by the act (*g*).

Infant cannot admit title in foreclosure suit.

A legacy was bequeathed (*h*) to "Sophia, daughter of S." S. had only two daughters, one named Selina, and the other Mary Ann. There was evidence to shew that Selina was the person intended, but as the other daughter was an infant, the Court would not make a declaration to that effect at the hearing, but referred it to the Master to inquire who was the legatee intended by the description in the will.

Evidence strictly required against infants.

Where facts are to be proved against infants, the witnesses ought (as in all cases where the parties do not consent to a different course) to be examined on interrogatories, and the Master ought not to proceed on affidavits. In the case of *Tillotson v. Hargrave* (*i*), where affidavits by people in America had been improperly received, Sir J. Leach, V. C., on motion, directed the Master not to proceed upon them; with liberty, under the circumstances, to apply to the Court, if, by death or otherwise, it became impossible to obtain, under a commission, the evidence of the persons who had made the affidavits.

Witnesses to be examined on interrogatories.

(*d*) *Brookfield v. Bradley*, Jac. 632; *Baillie v. Jackson*, 10 Sim. 167; see *Montgomery v. Reilly*, 1 Bligh, N. S. 391, *supra*, p. 385. (*g*) *Lushington v. Price*, 9 Sim. 651; *Grans v. Mitchell*, 10 Sim. 484. (*h*) *Still v. Hoste*, 6 Madd. 192. (*i*) 3 Madd. 496, *supra*, p. 386. Swanst. 375.

It seems that a will cannot be declared well proved against an infant upon proof of the handwriting of a witness who is abroad; but there must be a commission to examine the witness (*k*).

Infant heir bound by admission of his ancestor.

If, in a suit to establish a will, the heir admits the will, and dies before the hearing, his heir, though an infant, is bound by the admission, and the will need not be proved against him (*l*).

Exhibits proved at the hearing.

In the Exchequer (*m*), where an infant was party, and his interest was concerned, the Court did not allow of an order to examine a witness *viva voce* to prove a deed or exhibit, but the witness must have been examined in the office upon interrogatories (*n*); but there seems to be no rule of the Court of Chancery which prevents the proving of exhibits *viva voce* at the hearing, in the case of infants, any more than of adults (*o*).

Fact of bankruptcy may be disputed without notice.

Infant defendants have been held not to be precluded, by failure in giving the notice required by act of Parliament (*p*), from disputing the fact of bankruptcy; and an inquiry before the Master has been directed (*q*).

Infant heir entitled to issue. Counsel may waive the right.

Where a bill is filed to establish a will against an infant heir, the heir is entitled to an issue *devisavit vel non*; but if the counsel for the infant heir is clear, from the evidence, that there is no ground to impeach the will, he is fully justified in declining to ask for an issue (*r*).

Guardian may be removed.

If the guardian does not do his duty, the Court will allow him to be removed, but as long as he continues he is considered responsible (*s*).

(*k*) *Fisherbert v. Fisherbert*, 4 Chancery, stat. 5 Vict. c. 5. Bro. C. C. 231.

(*n*) *Carlton v. Brightwell*, 2 P. W. 462.

(*l*) *Look v. Foote*, 4 Sim. 132, where the cases of *Sleeman v. Sleeman*, (Dick. 787), and *Cartwright v. Cartwright*, (Dick. 545) are corrected.

(*o*) 1 Dan. C. P. 241.

(*p*) 49 Geo. 3, c. 121, s. 11.

(*q*) *Bell v. Tinney*, 4 Madd. 372.

(*r*) *Loy v. Loy*, 3 Madd. 245.

(*m*) Equity jurisdiction of the Court transferred to the Court of

(*s*) *Russell v. Sharpe*, 1 J. & W. 482.

And infants are, generally speaking, as much bound by the proceedings in a cause as persons of full age. Thus it seems that if, in the case of *Tillotson v. Hargrave* (t), the solicitor for the infants had concurred in the use of affidavits instead of interrogatories, the infants would have been bound.

Infants bound by the conduct of their solicitor in a cause.

Considerable importance is attached to the discretion of the guardian. Thus (x), an infant heir and devisee having been made party, by supplemental bill, to a suit in which a sale of the land of his ancestor and devisor had been decreed, and it being for the infant's advantage that the sale should be expedited, Lord Chancellor Hart, on the consent of the guardian and all the other parties, made an order, without a reference, for publication to pass in the second cause, and for its being set down out of the regular course, in order to secure an early hearing.

Instance of the weight attached to the guardian's consent in the proceedings.

But it was held, in the same case, that a decree on the supplemental bill was indispensable before a sale could be had; and the Court refused a reference to inquire whether it would be for the benefit of the infant that the sale should be effected before such a decree.

If an infant defendant comes of age before a decree has been made in the cause, he may (x) obtain leave from the Court to amend his answer, or to put in a new one, and he may go into evidence in support of the new defence thus made (y). In what cases this may be done *after* decree shall be considered hereafter. But leave should be applied for immediately after the defendant attains his majority, otherwise the defendant will be bound by his answer.

Infant attaining 21 before decree, may make a new defence.

On a bill, praying the sale of a trust estate for portions, the infant heir, by his answer, desired that the trust estate might not be sold, and offered to subject other lands to the portions. *At the hearing*, four years after he came of age, he

But must apply immediately on coming of age.

(t) *Supra*, p. 407.

(x) See *Davis v. Dowding*, 2

(u) *Sheppard v. Green*, 1 Moll. Keen, 248, *infra*, p. 418.

(y) See *infra*, p. 415.

was held to be bound by this offer, because, if he meant to retract it, he ought immediately, when he came of age, to have applied to the Court for leave to amend his answer (z).

Answer read
against infant
on re-hearing.

It seems, that where a defendant, being an infant, answers by guardian, and at full age neither amends nor makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer shall be evidence against him (a).

Infant's answer
read against
guardian.

The answer of an infant may, it seems, be read against the guardian; and in *Beasley v. Magrath* (b), the answer of an infant by his mother and guardian, in another cause, was read against the mother.

Subpoena to
hear judgment
must be served
on guardian.

Service of a subpoena to hear judgment, personally on an infant, is not good service, whatever his age may be. It is necessary to serve his guardian *ad litem*, who is assigned for the purpose of answering and defending the suit; and this is agreeable to the language of the order assigning him the infant's guardian (c).

This service
good, though
infancy deter-
mined before
judgment.

In a case where the defendant being an infant when the suit was instituted, put in his answer by his father, as guardian; he resided with his father, and the subpoena to hear judgment was served on the father. Lord Manners held, that this was good service, and that no further service was necessary, although the son had attained his full age before judgment was actually given (d).

Proceedings
where infant
heir makes de-
fault at the

Where, at the hearing of a cause, the defendant, the heir-at-law, who was an infant, made default, the parties were to take such a decree against him as they could sustain, with a day to shew cause; but as it was necessary that the will should

(z) *Cecil v. Earl of Salisbury*, 2 Vern. 224; see *Bennet v. Leigh*, C. P. 402.

Dick. 89. (c) *Taylor v. Atwood*, 2 P. W.

(a) *Hinde*, C. P. 422; 2 Dan. 643; *Freeman v. Carnock*, Dick. 439.

(d) *Lloyd v. Lord Trimleston*, 2 Molloy, 329.
This must be understood of cases in which a day has been given to shew cause: see the next section.

be declared to be proved, Lord Hardwicke ordered the proofs to be read, in order that he might so declare it (*e*).

Until the passing of stat. 1 Will. 4, c. 47, the rule of law enabling the parol to demur where an infant heir was sued on a specialty of his ancestor, i. e. enabling the heir to plead that he was an infant, and that he ought not to answer until he was of age (*g*), prevailed also in courts of equity, and the parol demurred in equity in those cases, and those only, in which it would have demurred at law (*h*). Where the parol demurred, nothing was done to affect the infant; the Court, indeed, on a bill to marshal assets against an infant heir, did declare the rights of the parties, and appointed a receiver of the estate, thus securing the rents for the creditors (*i*); but it did not decree satisfaction out of the real estate, nor direct a sale, until the infant came of age (*j*). And even where an estate descended to an infant heir, subject to a trust to sell for payment of certain incumbrances, and a sale was decreed accordingly; it was held that neither the unsold part (if any) of the estate, nor any part of the money arising by the sale which should remain after discharging the incumbrances, could be resorted to for the payment of other specialty debts during the minority of the heir (*k*).

Parol demurred in equity, where it would have demurred at law.

Court declared right.

But now, by stat. 1 Will. 4, c. 47, s. 10, parol demurrer is abolished; and by s. 11, infants are enabled to convey their estates after decree in certain cases, comprehending those in which the parol would have demurred.

Parol demurrer abolished.

(*e*) *Webb v. Litcott*, Dick. 38; 433; S. C. 1 Dick. 696; *Leckmere* S. C. 3 Atk. 25.

(*g*) *Supra*, p. 360.

v. Brasier, 2 J. & W. 290; *March*

(*h*) See *Plaskett v. Beely*, 4 East, 485; Set. Dec. 268; *Price v. Carver*, 3 M. & C. 157, where the cases are reviewed.

v. Bennett, 1 Vern. 428. (*j*) *Wilson v. Pollard*, Set. Dec. 269; 1 S. & S. 209.

(*k*) *Scarth v. Cotton*, Jac. 635, n.; S. C. Ca. temp. Talb. 198.

(*i*) *Sweet v. Partridge*, 1 Cox,

SECTION IV.

Of Decrees by which a Day is given to shew Cause.

In what cases a day is given.

IN all cases in which a conveyance is required from an infant heir, (except those in which the parol would have demurred at law), and also in all cases of foreclosure, the rule of equity has been to give the infant a day to shew cause, i. e. to insert in the decree a direction that it shall be binding on him, unless, on being served with subpoena, he shall, within six months after he shall attain the age of twenty-one, shew to the Court good cause to the contrary (*l*). The decree in such cases is complete, but the infant has a day given to shew cause against it; and if he does not shew good cause within the time specified, he is bound. This clause is completely distinct from the direction for parol demurrer, though probably suggested by it (*m*), as well as by the incapacity of infants to convey real estate; and in many cases where the parol was held not to demur, a day has been given to shew cause (*n*).

Infant bound, if no cause shewn.
Distinct from parol demurrer.

Infants now enabled to convey in certain cases.

But now, by stat. 1 Will. 4, c. 47, s. 11, it is enacted, that where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, compel such infant or infants to convey such estates

(*l*) *Price v. Carver*, 3 M. & C. 157. (*n*) *Price v. Carver*; and see Set. Dec. 266.

(*m*) 2 Atk. 531.

so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes, as if such person or persons, being an infant or infants, was or were, at the time of executing the same, of the full age of twenty-one years.

The Court is thus enabled to take from the infant the legal estate in property decreed to be sold for the payment of debts, but for that purpose only; and to this extent, it has become unnecessary to give the infant a day to shew cause. In all other cases in which a conveyance is required from an infant, the law and the practice remain as before (*o*).

How far day to shew cause taken away.

Most of the reported cases on this subject have been cases where the real estate was decreed to be sold for the payment of debts. The decisions are not in perfect harmony with each other, but their general effect has been stated nearly as follows (*p*):—

General effect of decisions as to day to shew cause.

Where lands were devised to trustees to be sold for payment of debts, and the heir-at-law was an infant, he had no day given him to shew cause on his coming of age; but he had a day given where there was no devise of lands expressly to any particular person, and where consequently a conveyance from him was necessary (*q*); and where lands descended to him, subject to a charge of debts (*r*) or of legacies (*s*), or to any equitable lien or charge (*t*): so, where real estate descended to an infant, subject to a trust for sale (*u*).

(*o*) *Price v. Carver*, 3 M. & C. 157. (*r*) *Hargrave v. Tyndal*, 1 Bro. C. C. 136, n.

(*p*) See Set. Dec. 267.

(*q*) *Blatch v. Wilder*, 1 Atk. 421; (*s*) *Mould v. Williamson*, 2 Cox, S. C. West, 324; and see *Cooke v. Parsons*, Prec. in Ch. 184; S. C. 2 Vern. 429; *Fountain v. Caine*, 1 P. W. 504; *Uvedale v. Uvedale*, 3 (*t*) *Brookfield v. Bradley*, Jac. 632. (*u*) *Uvedale v. Uvedale*, 3 Atk.

No day when legal estate in trustees, and execution of trust directed.

Nor where will proved against infant.

Subpoena to shew cause, when returnable.

Where substituted service good.

Where time for shewing cause will be enlarged.

Decree made absolute, if no cause shewn.

Where the legal estate is in trustees, and an execution of the trust is directed, the infant cestui que trust has not a day to shew cause (*v*).

A decree for confirming or avoiding a will where an infant is heir or devisee, is final, and the infant has no day given him to shew cause (*x*).

The subpoena to shew cause against the decree being made absolute, is a judicial writ, and was according to the ancient practice returnable in term (*y*). But it is now returnable within a certain number of days after service on the defendant (*z*). Where the infant, after coming of age, had gone abroad to avoid his creditors, service of the subpoena on his clerk in court was held sufficient (*a*).

After the infant comes of age, the Court will enlarge the time for shewing cause against the decree, if a proper case is made out for such interference. Thus, the time was enlarged more than once, until the plaintiffs in the first cause should put in an answer to a bill of discovery filed against them by the defendant after he came of age (*b*); and the fact that a new answer has been put in by the defendant is good cause to shew against making the decree absolute (*c*).

If, after a subpoena to shew cause being served upon the defendant, he does not appear, or shews no cause, the decree will, upon motion, supported by affidavit of service and certificate of non-appearance, be made absolute at the end of the time given (*d*).

117, where however the bill was brought by a specialty creditor, who was entitled to satisfaction out of the real estate, before the trust for sale could be performed. See *Davidson v. Goddard*, Gilb. 66; but see *Scarth v. Cotton*, Ca. temp. Talb. 198; S. C. Jac. 636, n. (*e*) *Thornton v. Blackburn*, 2 Eq. Ca. Ab. 303.

(*x*) *Whitechurch v. Whitechurch*, 9 Mod. 124.

(*y*) Gilb. For. Rom. 160.

(*z*) See 1 M. & K. Appendix, p. xxiv.

(*a*) *Elcock v. Glegg*, Dick. 764.

(*b*) *Trefusis v. Cotton*, Mos. 203.

(*c*) S. C. Mos. 313.

(*d*) *Wharam v. Broughton*, 1

After the infant comes of age, and before the decree is made absolute, he may, as a matter of course, obtain leave, upon motion, to amend his answer, or to put in a new one; for the permission to shew cause would be merely nugatory, if he were bound by the answer of his guardian (*e*). By the new answer he may make a better defence, and support that defence by evidence; he may examine witnesses anew, and he may file a bill of discovery. Thus to amend the defence, is the proper course, where matter that appeared at the time of the hearing was not insisted on, or where new matter has been discovered since that time (*g*). In cases of foreclosure, indeed, but in those only, he is confined to shewing error in the decree (*h*).

Defendant, on coming of age, may make a new defence, and go into evidence.

In what cases this is the proper course.

On foreclosure, confined to shewing error.

Where a defendant, on coming of age, applies for leave to put in a new answer, the Court requires proof that he has come of age. The regular evidence is an extract from the parish register of baptisms, with an affidavit verifying the extract, and the identity of the defendant (*i*); but the registers of places not in England seem to be regarded with less confidence, and Lord Kenyon, when M. R., refused to receive a Guernsey register (*k*).

Attainment of majority must be proved.

Evidence.

Where a day has been given to shew cause, an infant, before he comes of age, may apply for leave to put in a better answer. This permission will not be granted as a matter of course, but it must depend upon circumstances shewn to the Court; as, in *Bennet v. Lee* (*l*), where the infant's case had been entirely mistaken by his guardian, and the *principal fact* in his case, as rightly understood, was of very long standing,

Where day is given, infant allowed to make new defence before majority; —under special circumstances.

Ves. 185; Gilb. For. Rom. 160; v. *Kelsall*, 2 M. & K. 409.

Trefusis v. Cotton, Mos. 313; 1 (*h*) See *infra*, p. 420.

Harr. 425; 1 Dan. C. P. 243. (*i*) *Kelsall v. Kelsall*, Reg. Lib.

(*e*) See the next section. 1833, A. fol. 913.

(*g*) *Fountain v. Caine*, 1 P. W. 504; *Napier v. Lady Effingham*, 275. (*k*) *Huet v. Le Mesurier*, 1 Cox,

supra, p. 387; 2 P. W. 403; *Trefusis v. Cotton*, Mos. 308; *Kelsall* (*l*) 2 Atk. 529.

and rested on the testimony of persons advanced in years, and who might die before he came of age.

In an earlier stage of the case just cited, an application had been made (*m*) for leave to answer again, before the infant came of age, and Lord Hardwicke, seeing that it would occasion infinite litigation if the infant should be allowed to put in a new answer as often as there was a decree against him, desired the matter to stand over; and eventually, when he granted leave, he took care to say that it could only be granted on special circumstances; thus, it seems, meeting the objection which had previously occurred to him, as to the vexation which might be occasioned if the infant had a right to rehear the cause *toties quoties*.

Permission
granted without
special case;

Lord Manners, however, in a case in Ireland, gave an infant permission, without putting in a new answer, to adduce new evidence which had come into his power subsequently to the decree, on the ground that this evidence was the testimony of witnesses then living, who (his Lordship remarked) might die, or their memory fail, and that it was better they should give their testimony then, *when the facts were recent*, than put the infant to the expense of a bill to perpetuate testimony (*n*). The circumstances thus relied on, were certainly very different from those upon which Lord Hardwicke proceeded in *Bennet v. Lee*; and Lord Brougham, C., has disapproved (*o*) of the decision, considering that no special case had been made out for granting permission for an infant to make a new defence.

but this deci-
sion questioned.

New evidence
ought not to be
adduced in aid
of former de-
fence.

Lord Brougham also expressed disapprobation of the shape in which the defence was allowed to be made, by adducing new evidence without putting in a new answer; and observed that no cases are to be found in which leave has been given to examine new witnesses to the former case made. "The leave given is," (said his Lordship), "to put in a new answer,

(*m*) 2 Atk. 487.

(*o*) See *Kelsall v. Kelsall*, 2 M.

(*n*) *Savage v. Carroll*, 1 Ba. & K. 409.

Be. 548.

and support the issues raised in that answer, and subject, of course, (though this may not be stated), to the plaintiff's right to except, and also to amend his bill; and it does not seem to be at all an unreasonable restriction of the privilege that the infant should be precluded from bettering his proof of a case formerly made; for, if he was of capacity of himself or by his guardians to make a case, he might also have proved it; nor is there any good ground for letting him mend his evidence, at least until he has fully satisfied the Court that he had been prevented by incapacity or other circumstances from adducing the additional evidence at an earlier period.

"The answer already made, and depositions already taken, may stand; but the parties must proceed on the new answer, exactly as if it had been the first."

In the case which gave rise to these observations, a decree had been made, before stat. 1 Will. 4, c. 47, directing, that if the testator's personal estate should prove insufficient for the payment of his debts, his real estate should be sold for that purpose; and giving to the infant defendant, the testator's devisee and heir-at-law, a day to shew cause (*p*). The infant, on coming of age, moved that he might be at liberty to put in a new answer; and the permission was granted. The order of the Court provided also, that the plaintiff should be at liberty to reply to such answer, and bring on the cause again to a hearing, as against the defendant; that the defendant should be at liberty to proceed to the examination of his witnesses, and the plaintiff should be at liberty to cross-examine them, and to make use of the depositions of the witnesses already examined; but not to examine any further witnesses on his part (*q*).

Proceedings
after the new
answer.

In a subsequent stage of the case of *Savage v. Carroll* (*r*), Lord Manners stated, that he did not intend the infant to

Whether infant,
making new
defence before

(*p*) Rolls, 6 Feb. 1830; Reg. Lib. 1829, A. fo. 1193.

(*q*) Reg. Lib. 1833, A. fo. 913.

(*r*) 2 Ba. & Be. 454.

majority, can
be bound as if
adult, query?

have another opportunity of going into a new defence; and that in order to prevent him from having a day to shew cause, he was in the further proceedings to be considered as a plaintiff, as in that case he would be as much bound by the proceedings as if he were adult.

This course seems incompatible with the principles upon which the privileges of infants depend; for the second defence might be mismanaged no less than the first; and the infant could not enforce his rights in either case. The judgment of Lord Hardwicke, in *Bennet v. Lee*, hints at no such restriction; and probably the best safeguard against vexatious litigation will be found in the rigorous examination, by the Court, of the circumstances upon which any special indulgence, such as permission to make a new defence before majority, is sought for.

Adult treated
by mistake as
infant, cannot
retain the in-
dulgence grant-
ed him.

An infant defendant in a cause (*s*) came of age before the decree; but that fact was not disclosed, and by the decree, a day was given him to shew cause. He afterwards, within the six months, moved that he might be at liberty to put in a new and further answer. Sir L. Shadwell, V. C., refused the permission sought for, and observed, that the decree was absolute; for the giving to the defendant, who had attained twenty-one, six months "after he should attain twenty-one," to shew cause against the decree, was giving him an impossible day.

A suit having been instituted (*t*) by mortgagees for the sale of the mortgaged property, an infant defendant, who was the heir and devisee of the testator, attained his majority some time previous to the hearing, but this circumstance was not disclosed; and by the decree, it was referred to the Master to inquire, whether it would be for the benefit of the supposed infant that the estate should be sold. The fact of his having attained his majority was then discovered; and the plaintiff

(*s*) *Powys v. Mansfield*, 6 Sim. 637.

(*t*) *Davis v. Dowding*, 2 Keen, 245.

moved that the decree might be varied, by directing the Master to sell the mortgaged estate. Lord Langdale, M. R., said, that the fact of the infant heir and devisee having attained his majority, was a fact which he might be presumed to have known; and that he might, if he had thought proper, on attaining his age, have made a new defence, or applied for leave to redeem. During his infancy, the defendant sustained no disadvantage; and it was his own default, if, when he attained his full age, he had omitted to make any application, which, it was suggested at the bar, might have aided his defence. The cause having been heard; no such application having been made; and there being no allegation of surprise, or want of notice, the plaintiffs were entitled, under the circumstances, to a sale of the mortgaged estates.

In various suits in the last century, the sale of infants' real estates, in case the personal estate of the ancestor or testator should prove insufficient, has been directed at the hearing (u); and this was the form of the decree in *Kelsall v. Kelsall*, in 1830 (v). But it has been expressly decided, that if real estate belongs to an infant devisee, liable to the payment of debts on the insufficiency of the personal estate, even if it is admitted on the hearing of the cause that the personal estate is insufficient, a sale cannot be directed until the accounts of the testator's personal estate and debts have been taken; but liberty will be given to the Master to make a separate report; and then, if it appears from the report, that the personal estate is insufficient for the payment of the debts, the Court, on hearing the cause for further directions, will direct the real estate to be sold (x).

Sale of infant's real estate not directed till personal estate has been reported insufficient.

Master may make a separate report.

(u) *Hargrave v. Tyndal* or *Richardson*, Set. Dec. 272; S. C. 1 Bro. C. C. 136, n.; see *Blatch v. Wilder*, 1 Atk. 420; *Uvedale v. Uvedale*, 3 Atk. 119; *Pope v. Guyn*, 2 Dick. 683.

(v) *Supra*, p. 417.
(x) *Birch v. Glover*, 4 Madd. 376; *Baillie v. Jackson*, 10 Sim. 173; see *Mould v. Williamson*, 2 Cox, 386; *Bennett v. Hamill*, 2 Sch. & Lef. 566.

How far the produce of the sale is personalty.

Where an infant's real estate has been sold, under a decree, for the payment of debts, and the produce of the sale is more than enough for that purpose, it is conceived that the rule so much insisted on (*y*), against the conversion of infants' property, will have its full application; that the surplus money will retain the character of real estate, until the owner, at full age, takes it as personalty; and that if he dies under age, it will go to his heir. On any other view, the Court would be practising a wanton interference with the property of infants. It is true that timber severed by a storm, or by the act of a trespasser, belongs to the personal estate, but the Court must be supposed to act with intelligence, and not to mean that the infant's position with regard to his property should be altered, any further than is necessary for the payment of debts. That the mere fact of conversion does not indelibly impress the property with the character of personalty, is proved by the case of *Tullit v. Tullit* (*z*).

Suits to enforce mortgage securities;—
Foreclosure against infant; day given.

In suits instituted to obtain the benefit of mortgage securities, a decree of foreclosure may be made against an infant (*a*), but he must have a day given him to shew cause, after attaining the age of twenty-one (*b*). In the order for making the foreclosure absolute (if, indeed, it can be called so in such a case) a day is also given to the infant to shew cause (*c*).

Under special circumstances,

In one case, indeed (*d*), instead of decreeing a foreclosure

(*y*) See chap. xxv.

(*z*) *Supra*, p. 299. The position in the text seems inconsistent with the case of *Flanagan v. Flanagan*, cited 1 Bro. C. C. 500, 513; 2 Ves. jun. 77, 176, 179; but that case (whatever weight may belong to it) will be found to depend upon the words of the will.

(*a*) *Contra*, 2 Vern. 518; but see the cases in the next note.

(*b*) *Booth v. Rich*, 1 Vern. 295; *Williamson v. Gordon*, 19 Ves. 114;

Price v. Jones, M. R., 15th February, 1743, Reg. Lib. B. 1742, fol. 207. And see *Mallack v. Galton*, 3 P. W. 352; *Anon.*, Mos. 66; *Bennet v. Edwards*, 2 Vern. 392; Set. Dec. 274; see as to the practice in Ireland, *Flood v. Sutton*, 1 Flanagan & Kelly, 179.

(*c*) *Williamson v. Gordon*, *ubi supra*.

(*d*) *Spencer v. Boyes*, 4 Ves. 370; see 3 M. & C. 159.

against an infant, Lord Alvanley, M. R., merely directed the accounts to be taken, and that in default of payment the plaintiffs should be let into possession, and hold and enjoy, till the heir should attain twenty-one, at which time he should surrender; and a day was given to shew cause against the decree. But the circumstances of the case were peculiar. The mortgaged property had been conveyed by the mortgagor to the mortgagee by lease and release; and the mortgagor, who was the defendant in the suit, had entered into a covenant for further assurance. A bill having been filed for a foreclosure, the defendant by his answer stated that the property was copyhold, and did not pass by the conveyance: upon which a supplemental bill was filed, stating the covenant for further assurance; and Lord Alvanley held that, under such a covenant, the plaintiff could not be entitled to a better conveyance than that which would be made by lease and release.

decree of foreclosure refused.

After a decree of foreclosure, an infant is not permitted to open the account, or to redeem the mortgage by paying what is reported due; and he can shew no cause but error in the decree (c).

After foreclosure, no cause can be shewn but error.

This restriction does not, of course, extend to cases of fraud, nor to any case in which the plaintiff and the infant defendant did not indisputably stand, when the decree was made, in the relation of mortgagee and mortgagor, (or devisee or heir of the mortgagor).

Except in cases of fraud, or where infant claims paramount the mortgage.

Thus, where in a foreclosure suit, the infant's defence was, that he was tenant in tail by a title paramount the mortgage, but the ordinary decree for foreclosure was pronounced, on the ground that the mortgagee had got the legal estate without notice: the infant, on coming of age, applied for leave to put in a new answer, swearing he believed he could now prove that the mortgagee had notice of his title when he lent

(c) *Mallack v. Galton*, 3 P. W. 352; *Lyne v. Willis*, 3 P. W. 352; *Bishop of Winchester v. Bea-*
vor, 3 Ves. 317; *Williamson v. Gordon*, 19 Ves. 116.

the money, which was not insisted on in the former answer, and the motion, though opposed, was granted as a matter of course (*d*).

On bill of foreclosure, reference to inquire whether sale beneficial to infant ;

or, if beneficial, sale without reference.

On a bill of foreclosure against an infant (*e*), Sir W. Grant, M. R., refused a reference to the Master (though desired by the plaintiff as well as the defendant) to inquire whether a sale would be for the benefit of the infant. But Lord Eldon in a subsequent case (*g*), the plaintiff having prayed a sale, declared, that if there was no precedent, he would make one, but that he was sure it had been done; and directed that in case the mortgagees should consent to a sale, the Master should inquire and report whether it would be for the benefit of the infant that the estate should be sold. And Sir H. Seton has adduced (*h*) several cases in which a sale was directed even without a reference: in one case, the bill prayed a sale, the order is stated to be made by consent of the plaintiff, and the defendant was to be paid his costs (*i*); in another, a sale was not prayed, and the order is made without costs to the defendant, and is not stated to be by consent (*k*); in another, a sale was not prayed, costs are given to the defendant, and the order is not said to be by consent (*l*).

The practice, according to the latest authorities (*m*), is as follows:—

In a suit by mortgagees for the sale of the mortgaged property, where the devisee or heir of the mortgagor is an infant, whether the mortgage is legal or equitable, the Court usually directs a reference to the Master to inquire whether a sale will be for the benefit of the infant. But where it appears clearly to the Court that a sale will be for the benefit of the infant, a

(*d*) *Anon.*, Mosely, 66.

(*e*) *Goodier v. Ashton*, 18 Ves. 83.

(*g*) *Monday v. Monday*, 1 V. & B. 223.

(*h*) Set. Dec. 274, 275.

(*i*) *Pace v. Marsden*, M. R., 4 Dec. 1747.

(*k*) *Wakeham v. Lome*, M. R.,

9 Dec. 1747.

(*l*) *Hamond v. Bradley*, M. R.,

13 July, 1748.

(*m*) *Davis v. Dowding*, 2 Keen,

245; *Scholefield v. Hoafield*, 7 Sim. 669.

sale will be directed in the first instance, and the day to shew cause, formerly allowed (*n*) in such cases, is now unnecessary.

Where lands are sold before a Master under the decree of the Court, and the legal estate is vested in an infant, the Court will (except in the case of lands decreed to be sold for payment of debts) decree that the infant shall convey when he comes of age, unless he then shews cause to the contrary; and that the purchaser shall in the mean time hold and enjoy (*o*).

Form of decree, where infant's estate sold under decree (not for payment of debts).

Upon this decree it will compel the purchaser to complete his contract, though it can give him, in the first instance, only an equitable title; because the infant is bound by the orders of the Court, the purchaser buys with notice of the infancy, and it is said, it must be presumed, that, in the price given for the estate, allowance was made for the infancy of the heir (*p*). The parties are bound by the orders of the Court, and where they are under disability to make a present conveyance, it is of necessity that a purchaser must accept the order of the Court for a future conveyance as a sufficient security (*q*).

Purchaser must complete, though title only equitable at first.

Thus, in a case (*r*), where, upon sale of an estate before a Master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant; Lord Loughborough, without hesitation, compelled the purchaser to take the title, making his decree for the infant to convey in the usual form; because, as the purchaser bought under the decree, he was bound to accept such a title as the Court could make him (*s*); and it is

(*n*) *Pace v. Marsden*, *supra*, p. 422.

(*o*) *Hargrave v. Richardson*, Set. Dec. 270; see *Powell v. Powell*, 6 Madd. 53; *Blatch v. Wilder*, 1 Atk. 421; *Chandler v. Beard*, Dick. 392; *Pope v. Guyn*, Dick. 683; *Mould v. Williamson*, 2 Cox, 396.

(*p*) 3 Swanst. 566, per M. R.

(*q*) *Powell v. Powell*, 6 Madd.

53.

(*r*) 2 Sug. Vend. 193, 10th ed.

(*s*) But a purchaser under a decree will not be compelled to take a doubtful title. See *Marlow v. Smith*, 2 P. W. 198.

Court will not retain purchase money to pay fine on death of infant copyholder.

Court will not compel a second purchaser to take the title.

stated by Sir Edward Sugden (t), that, in a case of this nature, Lord Loughborough would not sanction an application by the purchaser, at his own expense, for an act of Parliament to divest the infant of the legal estate. Nor, if the estate be copyhold, will the Court retain any part of the purchase-money in order to defray the expense of the fine that would be payable, in case the infant heir should die before he surrendered (u).

And although a purchaser *under a decree* will be compelled to accept a title of this nature, yet, if he sell the estate, the Court will not enforce a specific performance against the second purchaser (v).

This was also decided by Lord Loughborough. The purchaser of Lord Waltham's estate sold the estate to a person who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser filed a bill for a specific performance, but Lord Loughborough dismissed it; because such second purchaser *did not buy under the decree*, and therefore was not compellable to accept an equitable title.

In a case where a seller after the contract died intestate, leaving an infant heir, who filed a bill against the purchaser, praying that he might elect either to complete or abandon the contract; and the purchaser submitted to perform the contract, and paid the purchase-money into Court, the Master of the Rolls refused to pay it out without the consent of the purchaser during the infancy of the heir (w).

In another case, where, after a contract for sale, the seller died intestate, leaving an infant heir, and his widow, who was his administratrix, filed a bill for a specific performance against the purchaser and the heir, it was decreed accordingly, and a day given to the heir to shew cause. But the objection, that the

(t) 2 Sug. Vend., *ubi supra*.

(v) 2 Sug. Vend. 194, 10th ed.

(u) *Morris v. Clarkson*, 1 J. & W. 604, n.; 3 Swanst. 558.

(w) *Bullock v. Bullock*, 1 J. & W. 603; but see *infra*, p. 437.

purchaser was not bound to accept the title in consequence of the infancy of the heir, was not taken (*x*).

Where a purchaser was in possession of an estate, and had exercised acts of ownership, he was ordered to pay his purchase-money into Court, though the vendor had died in the mean time leaving an infant heir, who was a necessary party to the conveyance (*y*).

It may here be observed, that where a bill is brought to foreclose an infant, and the accounts are ordered to be taken, and the infant to pay what shall be reported due, unless he shews cause within six months after he comes of age; after the Master's report of the principal and interest due has been confirmed, the whole sum so reported due, both principal and interest, shall carry interest (*z*).

The Court makes no question of the obedience of the infant to its decree, when he shall come of age, and the distribution of the purchase-money will not be stayed (*a*).

Purchase-money will be distributed.

The infant, when he comes of age, will be ordered to convey (*b*). He is liable to commitment for disobeying any decree of the Court (*c*).

Heir ordered to convey.

In a suit for the partition of an estate (*d*), if any of the defendants from whom a conveyance is required are infants, the decree can only extend (as where an infant is plaintiff in a suit for partition (*e*)), to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made; the decree orders the conveyances to be made when the infants attain twenty-one. They have, as defendants, a day

Decree for partition against infants.

Day given.

(*x*) *Holland v. Hill*, Rolls, 1818; 2 Sugd. Vend. 196, 10th ed.

(*b*) Set. Dec. 272.

(*y*) *Bradshaw v. Bradshaw*, 2 Mer. 492.

(*c*) *Oliver and King v. Challinor*, Tothill, p. 172; 11 & 12 Eliz.

(*s*) See *Crouse v. Hunter*, 2 Ves. jun. 167; and Mr. Raithby's note to *Bennet v. Edwards*, 2 Vern. 302.

(*d*) Lord Redesd. 121, 4th ed.; Set. Dec. 275; *Agar v. Fairfax*, 17 Ves. 545, 554; *Attorney-General v. Hamilton*, 1 Mad. 214.

(*a*) *Morris v. Clarkson*, 3 Swanst. 558.

(*e*) *Supra*, p. 386.

to shew cause after attaining twenty-one (*g*); and if no cause be shewn, or cause shewn be not allowed, the decree may then be extended to compel mutual conveyances.

Conveyances respited.

The ancient course was to decree mutual conveyances to be executed by the adult parties, and by the infant at twenty-one, unless he should shew cause to the contrary (*h*). But Lord Hardwicke held these decrees to be improper (*i*), and though the correction was not invariably adhered to in Lord Hardwicke's time, yet Lord Thurlow adopted it, and it is now fully established (*k*).

SECTION V.

Of Decrees in which no Day is given to shew Cause.

Dicta, that a day must be given in all cases.

It has been said (*l*) that in all decrees against infants, even in the plainest cases, a day must be given them to shew cause when they come of age: the omission of it has been (*m*) said to be error in the decree.

It appears, however, that these expressions are too comprehensive.

In examining the state of the law before the recent changes, we find the cases in which a day was given carefully distinguished, though not perhaps with uniform correctness, from those in which it was not given (*n*).

The late acts (*o*) empowering the Courts to direct infants to convey real estate decreed to be sold or mortgaged for the

(*g*) *Price v. Carver*, 3 M. & C. 2 P. W. 403; *Cary v. Bertie*, 2 Vern. 342.

(*h*) 1 Dick. 242; *Equity Draftsman*, vol. 2, p. 385, 2nd ed. (*m*) *Savage v. Carroll*, 1 Ba. & Be. 551; and see *Bennett v. Hamill*,

(*i*) See p. 387, *supra*. 2 Sch. & Lef. 577; *Kelsall v. Kelsall*, 2 M. & K. 411.

(*k*) See Set. Dec. 275.

(*l*) In *Eyre v. Countess of Shaftesbury*, 2 P. W. 120; see Set. Dec. (*n*) *Supra*, p. 412.

(*o*) 1 Will. 4, c. 47; 2 & 3 Vict. 267; *Napier v. Lady Effingham*, c. 60, *infra*, p. 429.

payment of the debts of their ancestor or testator, have rendered it unnecessary to give the infants a day to shew cause against the decree by which such conveyance is directed (*p*).

It is evident, then, that there was always a very large class of cases, which modern enactments have made still larger, in which no day could be given.

In the case of *Sheffield v. The Duchess of Buckingham* (*q*), Lord Hardwicke defined the practice of his time, saying that "he took it to be the course of the Court not to give a day, unless a conveyance was directed either in form or substance." The expressions noticed above (*r*), which seem to contradict this statement, were all or nearly all used in cases in which a day to shew cause was given, or ought to have been given; and it will appear plainly upon examination, that this circumstance must be taken to qualify the dicta in question; and that the rule, as deduced from the cases, and laid down in a recent judgment of Lord Cottenham, is in accordance with the statement already (*s*) made, that a day is given only in case of foreclosure, and in cases in which a conveyance is required from an infant heir or devisee; except those in which the parol would have demurred at law, and those in which real estate has been decreed to be sold or mortgaged for the payment of the debts of the ancestor or devisor under whom the infant claims.

Rule of Lord Hardwicke.

In what cases only a day is given.

Exactly co-extensive with the grant of a day to shew cause, seems to be, upon principle, the right to make a new defence after decree—the mode in which cause is most usually shewn.

Right to make new defence after decree, is co-extensive with day to shew cause.

The expressions of Lord Chancellor Brougham, in *Kelsall v. Kelsall* (*t*), where an infant defendant was allowed to make a new defence after coming of age, have seemed to countenance the opinion (*u*), that all infant defendants have an unli-

(*p*) *Scholefield v. Heafeld*, 7 Sim. 669.

(*s*) *Supra*, pp. 412, 413.

(*t*) 2 M. & K. 409.

(*q*) 1 West, 684; see *Adams v. Gould*, Dick. 443.

(*u*) See 1 Dan. C. P. 237; 2 Dan. C. P. 403.

(*r*) *Supra*, p. 426.

mitted right to answer anew on coming of age, even after decree. But this could not be his Lordship's meaning; for the decree in the case before him had given the infant a day to shew cause (*v*); and the same circumstance entered into all the cases upon which his decision was grounded: as, for instance, the case of *Fontaine v. Caine* (*x*), where Sir Joseph Jekyll assigned, as a reason for the permission, that, if the infant were not permitted to answer anew, it would be allowing him to shew cause, and, at the same time, tying up his hands from doing so.

An Irish case (*y*), in which an infant defendant obtained leave from Lord Plunket to put in a new answer and make a new defence, after a decree had been pronounced, not giving him a day to shew cause, came before the House of Lords, by appeal, on a different point; and Lord Cottenham, C., thus noticed the leave which had been given to the defendant to make a new defence:—

“That leave having been given, and that course having been adopted, and that not being a subject of complaint at your Lordships' bar, I abstain from entering into that part of the case, further than to observe, that if a question should arise, how far a party who was an infant during the time when a decree was pronounced, afterwards attaining twenty-one, is entitled to be let into a new defence in a case like this—if that question should arise, it is one which I think will require serious consideration. There is very great obscurity, and a great deal of contradiction, in the authorities upon that subject; and it is a proper subject for very serious consideration, whenever the question may arise. In this case it was done, and it has not been complained of; and, therefore, your Lordships can come to no decision upon that point.”

Where no day

It is therefore submitted, that an infant can make no new

(*v*) Reg. Lib. 1829 A., fol. 1193. & Walsh, 491; S. C. 1 West, Rep.

(*x*) 1 P. W. 504.

D. P. 637.

(*y*) *Malone v. O'Connor*, 2 Drury

defence after decree, unless the decree itself gives him a day to shew cause against it—a permission which would be unnecessary, if infants could, in all cases, make a new defence after decree, whenever they came of age; and that in all other cases he is (so far as regards the suit in which the decree has been made) finally bound (*a*).

given, infant bound by decree.

Under stat. 1 Will. 4, c. 47, s. 11, the infant heir of a devisee of a person whose lands were decreed to be sold, was ordered by Sir John Leach, M. R., to join in the conveyance to a purchaser; though the act provides, in terms, only for the case of the infancy of heirs *or* devisees (*b*).

The heir of a devisee ordered to convey under the statute.

Infants have also been ordered by the same learned Judge to convey, where the decree in the cause was made before the passing of the act (*c*). But Lord Brougham, C., held, in a subsequent case, that the eleventh section, though applicable to suits already commenced, is prospective as to the decree (*d*).

Whether the act is prospective as to the decree, query?

Infant tenants in tail are within the 11th section of stat. 1 Will. 4, c. 47, and have been directed (*e*) to convey estates decreed to be sold, by the proper assurance which the law now requires (*g*) for the conveyance of estates tail.

Tenants in tail within the act.

It was doubtful whether the stat. 1 Will. 4, c. 47, s. 11, empowered the Court, even for the benefit of the infant heir, to direct a mortgage of his real estate for payment of the ancestor's debts to which it was liable (*h*); but, by stat. 2 & 3 Vict. c. 60, the former act was extended to authorize Courts of Equity to direct mortgages as well as sales.

Stat. 1 Will. 4, c. 47, extended by 2 & 3 Vict. c. 60, so as to authorize mortgages.

Where an infant heir is a party to a cause and a necessary party to a conveyance decreed, the direction to the

The Master must settle conveyance to

(*a*) See *Wadham v. Moor*, Tophill, p. 173, 37 Eliz.

(*e*) *Radcliffe v. Eccles*, 1 Keen, 130; *Penny v. Pretor*, 9 Sim.

(*b*) *Brook v. Smith*, 2 R. & Myl. 73.

(*g*) See 3 & 4 W. 4, c. 74.

(*c*) *Chapman v. Tennant*, 2 R. & Myl. 74.

(*h*) See *Smethurst v. Longworth*, 2 Keen, 603; *Holme v. Williams*,

(*d*) *Kelcoll v. Kelcoll*, 2 M. & K. 415.

8 Sim. 557.

which infant is party. Master to settle the conveyance ought not to contain the usual words of qualification, "if the parties differ" (1).

SECTION VI.

Proceedings to set aside a Decree against an Infant Defendant.

New defence,
on coming of
age, before de-
cree.

After decree,
where day is
given.

It has been already stated, that an infant defendant, on coming of age before a decree has been pronounced in the cause, may, in all cases, put in a new answer and make a new defence; that, if a decree has been made, giving him a day to shew cause, he may put in a new answer, and make a new defence on coming of age, or even (under special circumstances) during his minority; and that this is the proper course to be adopted where matter that appeared at the time of the hearing was not insisted on, or where new matter has been subsequently discovered.

Erroneous de-
cree, where
error is in judg-
ment.

Where the
error is in facts.

Original bill
grounded on
fraud.

If an erroneous decree has been obtained against an infant, and the error is in the judgment of the Court, and is *apparent* on the face of the decree, as if it omits to give the infant a day to shew cause in a case where he is entitled to it (m); he may impeach the decree either by way of rehearing, where it has not been signed and inrolled, or by a bill of review, where it has; and there seems to be no reason why this should not be done during his minority. But if the error is not in the judgment of the Court, but in the facts on which the judgment is founded, as when there has been any fraud or collusion between the plaintiff and the guardian *ad litem*, or if there has been any deception or any surprize upon the Court, the infant may, either during his infancy or afterwards, investigate the decree by a bill of review, or a supplemental bill in the nature of a bill of review, or (as is usually

(1) *Calvert v. Godfrey*, 2 Keen, 267. tice in Ireland, see *Jackson v. Walsh*, 1 Drury & Walsh, 265.

(m) 17 Ves. 178. As to the prac-

done) by original bill. The proceeding on which the decree against him has been founded, is treated as fraudulent, though this expression may not, in its ordinary acceptation, be applicable to the transaction, it being considered fraudulent to take advantage of the incompetency of the infant to defend himself. It seems that the original decree may be pleaded in bar to a new bill praying relief on any other grounds than error or fraud (n).

An infant's property, consisting chiefly of renewable leaseholds for lives, held under an equitable title, had been sold under the decree of the Court of Chancery in Ireland, and the purchaser had got the legal estate, and sold again to another person. The infant, after he came of age, instituted a suit (o) to invalidate the sale. Lord Redesdale dismissed the bill (though without costs) as against the second purchaser and the representatives of the first purchaser. His Lordship held, that, assuming that there was error in the judgment of the Court in not giving a day to shew cause, and error also in directing a sale under the circumstances; yet the purchaser, under a decree of that description, was not bound to look into all those circumstances.

Infant's inheritance erroneously sold by Court; infant has no remedy against purchaser.

The general effect, he said, of the cases was, that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties; and that it has, on that investigation, properly decreed a sale; then he is to see that the decree binds the parties claiming the estate; that is, that all proper parties to be bound are before the Court: and he has further to see, that taking the conveyance, he takes a title that cannot be impeached *akiunde*. He has no right to call upon the Court to protect him from a title

(n) *Carew v. Johnston*, 2 Sch. & Lef. 292; *Richmond v. Tayleur*, 1 P. W. 737; S. C. Dick. 38; *Sheffield v. Duchess of Buckingham*, West, 685; *Trefusis v. Cotton*, Mos. 306; see *Ambler*, 229; 1 Dan. C. P. 222.
(o) *Bennett v. Hamill*, 2 Sch. & Lef. 566.

Secus, where purchaser privy to fraud.

not in issue in the cause, and in no way affected by the decree; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, the title of the purchaser ought not to be invalidated. It is otherwise where there has been fraud to which the purchaser was privy (*p*).

SECTION VII.

Costs of Infant Defendant.

Guardian liable for scandal or impertinence.

THE guardian of an infant defendant is liable *prima facie* for costs; he is also personally liable to costs if the answer be reported scandalous or impertinent (*q*); but where no misconduct is imputed to him, he seems to stand on the same footing, with regard to costs, as the *prochein amy* of an infant plaintiff.

Infant in contempt; plaintiff pays costs of assigning guardian.

An infant defendant having been brought up by the messenger to have a guardian assigned, Lord Hardwicke said that an infant defendant pays no costs of a contempt; the plaintiff always pays the messenger (*r*).

Solicitor volunteering to enter appearance made to pay costs.

A solicitor having, without authority, caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the solicitor to pay the costs (*s*).

Six-clerk assigned for guardian will be indemnified.

In a recent case (*t*), the question was, by whom the costs of the six-clerk in conducting the defence were to be paid. The bill was filed for a foreclosure, to which the mortgagor, his wife, and infant children, claiming under a settlement made

(*p*) See *Colclough v. Bolger*, 4 Dow, 54, 62.

(*s*) *Richards v. Dudley*, 2 Dan. C. P. 1.

(*q*) *Hinde*, C. P. 241.

(*t*) *Eley v. Bicknell*, Beames on

(*r*) *Perkins v. Hammond*, Dick. Costs, p. 90, 2nd ed. 287; see p. 401, *supra*.

subsequently to the mortgage, were parties as defendants, and it was for one of these infants that the six-clerk was appointed guardian, on the motion, as usual, of the plaintiff. The decree was pronounced for a foreclosure, and Sir J. Leach, V. C., gave the six-clerk his costs, which he ordered the plaintiff to pay, who was to have them over again from the defendants, with his other costs, in case of redemption; and the reasons upon which he gave the six-clerk his costs were, that as the Court itself had thrown the duty upon him, as its officer, it must indemnify and save him harmless. Sir L. Shadwell followed this case in two subsequent instances; in the latter of which the costs were given, as between solicitor and client (u).

After an equitable mortgage by deposit, the mortgagor died, leaving an infant heir. The Court directed a sale, the personal estate being insolvent, and ordered the infant to join in the requisite conveyances. The produce of the sale proving insufficient to satisfy the mortgage, the Court ordered the infant heir of the mortgagor to be paid out of such produce his costs of suit, and the costs of executing the conveyances (x).

Sale under equitable mortgage; infant heir allowed his costs.

The following note has been cited (y) from 2 Eq. Ca. Ab. 237:—"Although an answer confesses every thing that is prayed (alleged) by the bill, so that the plaintiff, in that case need not be at the trouble of proving it, yet, if the defendants are infants, the Court will compel the plaintiff to prove every thing; which he did, and had a decree: whereupon it was prayed, that the plaintiff should have *costs of all, and not for the bill and answer only*, which was granted."

Infant made to bear costs of proof rendered necessary by his infancy.

The Court had made an order confirming the Master's report for laying out money in land for a charity; but the purchase was not completed. An information was afterwards brought on behalf of the charity, against the devisee of

Whether information should be dismissed as against infant without costs, query?

(u) *Olive v. Avery*, *Higgins v. Brown*, Ibid. p. 91.

(x) *Bibby v. Shuffelbotham*, Ibid. p. 29.

(y) Ibid. p. 70.

the heir of the owner of one moiety of the land; and, the infant son of the owner of the other moiety, who had died, having settled his moiety on himself in tail, Lord Hardwicke refused to give effect to the order, for the reason (among others) that he could not decree specific performance against the issue in tail, and he dismissed the information *without costs*, even as to the infant tenant in tail, whom it was proper to bring before the Court (z). This decision has been questioned, and with reason, so far as it threw costs upon the infant (a).

Infant may be ordered to pay for unsuccessful defence on question of construction.

In a cause which turned on the construction of a will and settlement, the costs of the unsuccessful defence of an infant were not allowed out of the general fund, but were thrown upon his own share (b).

Costs on partition.

The decree in a suit for partition directs the costs of infants to be borne by their share of the property (c).

Infant not allowed costs arising out of trading.

Where the costs of an infant defendant, who was a trader, were prayed on the ground that he was a necessary party, Lord Manners, C., refused to give him costs in any proceedings arising out of the trading, and observed, that it is fraud in an infant, who is not subject to the Bankrupt Laws, to enter into trade (d).

(s) *Attorney-General v. Day*, 1 3 V. & B. 59.

Ves. 218.

(c) *Agar v. Fairfax*, 17 Ves.

(a) *Beames on Costs*, p. 71, 2nd ed. 557.

ed.

(d) *Magauran v. Jamieson*, 2

(b) *Earl of Oxford v. Churchill*, Molloy, 520.

CHAPTER XXXIV.

STATUTES ENABLING INFANT TRUSTEES TO CONVEY.

THE powers of infants over real estate were found to be inconveniently limited, and in order to remedy the inconveniences which others were thus subjected to, it was enacted by stat. 7 Ann. c. 19, that it should be lawful for infants having estates in lands, tenements, or hereditaments, only in trust for others, or by way of mortgage, by the direction of the Court of Chancery or the Court of Exchequer, by order made on the petition of the *cestui que trust*, mortgagor, guardian, or person entitled to monies secured on the lands, &c., or to the equity of redemption, to convey as the Court should direct.

Limited powers of infants inconvenient as regards others.

Provisions of stat. 7 Anne, c. 19.

This act extended (a) only to declared and not to implied trusts (b), and it did not apply to cases in which the infant had any duty to perform (c), or had any beneficial interest, or where it was doubtful whether he had a beneficial interest or not (d). It applied to estates in India and the colonies (e). It enabled the Courts to direct infants (if necessary) to levy a fine (g) or suffer a recovery (h).

A subsequent act (i) made similar provisions with respect

(a) See 3 Martin's Conveyancing, by Davidson, 672, n.

(b) *Godwyn v. Lister*, 3 P. W. 387.

(c) *Attorney-General v. Pomfret*, 2 Cox, 221; *Ex parte Chastaney*, Jac. 56.

(d) *Hawkins v. Obcen*, 2 Ves. 559.

(e) *Ex parte Anderson*, 5 Ves. 243.

(g) *Ex parte Mair*, 3 Atk. 479; Com. Rep. 615; *Lombe v. Lombe*, Barnes, 217.

(h) *Ex parte Smith*, Ambl. 624; *Ex parte Johnson*, 3 Atk. 559.

(i) 4 Geo. 3, c. 16.

to lands in the Duchy of Lancaster, the Counties Palatine, and Wales.

It was a point of great controversy (*k*) whether the 7 Ann. c. 19, enabled an infant heir-at-law to convey in performance of a contract made by his ancestor. It is now sufficient to refer to the cases (*l*), for that act was, with 4 Geo. 3, c. 16, and some others, repealed by the 6 Geo. 4, c. 74, which extended to cases in which the trustee had some duty to perform, or had some beneficial interest; authorizing in such cases a conveyance or transfer to new trustees duly appointed; but even the latter act was held not to embrace constructive trusts (*m*). The law now depends upon the 1 Will. 4, c. 60, which enables (*n*) infants seised or possessed of any land upon any trust or by way of mortgage, to convey the same by the direction of the Court of Chancery (*o*), or by the direction of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham respectively, as to premises within the jurisdiction of the same Courts respectively (*p*), to such person and in such manner as the said Courts respectively shall think proper. The act also provides (*q*), that every person, being in other re-

Infant seised in trust, or by way of mortgage, to convey by direction of Court of Chancery;

although he

(*k*) See 1 Sugd. V. & P. 321, 10th edition.

(*l*) *Ex parte Vernon*, 2 P. W. 549; *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28; *Godwyn v. Lister*, 3 P. W. 387; *Hawkins v. Oboen*, 2 Ves. 559; *Fearne's Posthuma*, 236; *Jerdon v. Forster*, 1 Sand. on Uses, 283, cited, 3rd ed.; *Ex parte Janaway*, 7 Price, 679; *Smith v. Hibbard*, Dick. 730; *Onsby v. Price*, *Fearne's Post.* 239.

(*m*) *Dew v. Clarke*, 4 Russ. 511; *King v. Turner*, 2 Sim. 550.

(*n*) Sects. 6, 7.

(*o*) The powers given to the Court of Chancery are extended to the Court of Exchequer; and as to land and stock in Ireland, to the Courts of Chancery and Exchequer there. Sect. 31. But as to the Court of Exchequer in England, see 5 Vict., 5.

(*p*) The Courts of Great Session in Wales, and the Court of Exchequer in the county palatine of Chester, are here inserted in the act; but they were abolished by 1 Will. 4, c. 70, s. 14.

(*q*) Sect. 15.

spects within the meaning of the act, shall be, and be deemed to be, a trustee within the act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform. And it expressly enacts (*r*), that where any land shall have been contracted to be sold, and the vendor, or any of the vendors, shall have died, either having received the purchase-money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract, either wholly or as far as the same remains to be executed, or as far as the same by reason of the infancy can be executed, shall have been decreed by the Court of Chancery in the lifetime of such vendor, or after his decease (*s*), and where one person shall have purchased in the name of another, but the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the Court, either before or after the death of such nominal purchaser, shall have declared him to be a trustee for the real purchaser, then in every such case the heir of such vendor, or of such nominal purchaser or his heir, in whom the premises shall be vested, shall be a trustee for the purchaser within the act.

may have a beneficial interest.

Act applies to heir of one who has contracted to sell, and to heir of nominal purchaser.

The husband of a female trustee, whether he be under any disability or not, is to be deemed a trustee within the act, wherever the husband's concurrence is necessary in anything to be done by the wife under the act (*t*).

Husband of female trustee is within the act.

Every direction or order to be made (so far as regards infants) in pursuance of the act (*x*), is to be signified by any order to be made in any cause depending in Court, or upon petition in the matter, and the person pointed out by the act is to be the petitioner, whether under disability or not; (that is to say), if the petition relates to a conveyance to or in such

How the direction of the Court is to be obtained.

(*r*) Sect. 16.

(*t*) Sect. 19.

(*s*) *Prytharch v. Havard*, 6

(*x*) Sect. 11.

Sim. 9.

manner as may be directed by any person beneficially entitled, it must be the petition of the person or some or one of the persons beneficially entitled to the land to be conveyed; and if it relates to a conveyance, in order to vest land in a new trustee appointed by virtue of some power or authority in the instrument creating or declaring the trust, or by the Court of Chancery, either alone or together with any continuing trustee, it must be the petition either of the trustee or some or one of the trustees in whom the land shall be proposed to be vested, or of some person having an interest therein; and if it relates to the conveyance of an estate in mortgage, it should be the petition of the person, or some or one of the persons entitled to the equity of redemption, or of the person or some or one of the persons entitled to the monies thereby secured, or the guardian or some or one of the guardians of the person entitled to such monies if an infant.

Lord Chancellor may direct bill to be filed.

The Lord Chancellor may, in doubtful cases, direct a bill to be filed to establish the right of the party seeking the conveyance (y); and where a conveyance is sought upon trusts to be executed, a bill must be filed for a new trustee and a conveyance (z).

In what case conveyance will be directed without petition.

Where an infant heir is declared by the decree of the Court to be a trustee for a purchaser, the Court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary (a).

But in all cases, except where there has been a decree, the Court must act upon petition, and it has no jurisdiction except in the mode prescribed (b).

Practice under the act.

Under (c) this and similar acts, there must be two petitions.

(y) Sect. 12.

(b) See *Baynes v. Baynes*, 9 Ves.

(x) *Es parte Anderson*, 5 Ves. 462.

240.

(c) Jemmett on the Statutes,

(a) See *Miller v. Knight*, 1 Keen, 2nd ed., p. 164.

129, and the cases there collected.

The first prays a reference to the Master to inquire whether the infant is a trustee within the meaning of the act, and for a conveyance; but the order of reference should not be obtained as of course; the Court should be satisfied that the petition is presented by the proper parties, and that the matter of the petition is within the scope of the act. Upon the Master's report, a second petition is presented, when the Court will either confirm the report, and give the consequential directions, or send it back to the Master to be reviewed. The Master's report under the order of reference cannot be excepted to (*d*).

The costs of petitions, orders, directions, and conveyances, under the act, may be ordered to be paid out of the property (*e*). Costs.

After (*g*) a decree in a suit for specific performance against the infant heir of a vendor, a petition must be presented under this act, for an order that the infant may convey to the purchaser; and as in such a case the vendor created the necessity for the suit by his own laches in omitting to devise the land to his executors, or to a trustee in trust to convey it to the purchaser, the costs of the suit, and the extra expense occasioned by having the conveyance settled by the Master, must be paid out of the purchase-money; though the purchaser must bear the expense of the actual conveyance.

Where the heir of a mortgagee has been found upon a reference to be a trustee of the mortgaged estate, and is ordered to reconvey it, the mortgagor must bear the costs of the reference, which were incurred in order to give the infant the capacity of reconveying (*h*). On re-convey-
ance by heir of
mortgagee,
mortgagor pays
costs of refer-
ence.

In very clear cases (*i*), the Court may appoint new trustees Where the

(*d*) See *Price v. Shaw*, Dick. 732; *Ex parte Swan*, Ibid. 749. (*h*) *Ex parte Ommamney*, 10 Sim. 298; *Earl of Miltown v. Lord Trimbleton*, 1 Flanagan & Kelly.

(*e*) Sect. 25.

(*g*) *Prytharch v. Harvard*, 6 Sim. 9; *Midland Counties Railway Company v. Westcomb*, 11 Sim. 67. See *In re Marrow*, 1 Cr. & Ph. 142. (*i*) Sect. 22.

Court will appoint new trustees on petition.

on petition, and direct the trust property to be conveyed to the new trustees, though there is no power to do so in the instrument creating the trust, and no suit has been instituted. The infancy of a trustee will give the Court jurisdiction to act (*k*).

Infants refusing to convey may be compelled by the ordinary process.

Infant trustees directed by the Court to convey may be compelled to do so in exactly the same manner as trustees of full age are compellable; by attachment, if they are parties to a cause in which the order has been made; if not parties, by an order that they convey within a certain period, and by commitment (on motion), in case of continued disobedience (*l*).

Court may appoint person to convey in room of trustee refusing.

Where trustees of land are out of the jurisdiction (*m*), or it is uncertain which of several trustees was the survivor, or whether the last trustee is living or dead, or who is his heir, or if they refuse to convey for twenty-eight days after tender of a conveyance for their execution, the Court may appoint any other person to convey in their stead. The person so appointed need not execute a new deed reciting the order, but he may execute the deed tendered to the trustee; and it should be expressed in the attestation clause, that he has executed it in the place of the trustee, in pursuance of the order (*n*).

Heir of assignee in bankruptcy.

There is no jurisdiction in bankruptcy against the infant heir of an assignee to declare him a trustee; it must be done upon petition under the statute (*o*).

Act extends to constructive trusts when declared by decree.

The act extends (*p*) (subject to certain exceptions) to every case of a constructive or resulting trust, other than those defined in the act,—when declared by decree.

Four co-partners purchased a freehold estate out of the assets of the partnership, and had it conveyed to them and

(*k*) *Whitley*, petitioner, *Fishbourne*, respondent, Ca. t. Sugd. 23;
Re Fitzgerald, Ibid. 20.

(*l*) Sect. 12; see *In re Beech*, 4 Madd. 128.

(*m*) Sect. 8.

(*n*) •*Ex parte Foley*, 8 Sim. 305.

(*o*) *Ex parte Kirk*, (Aug. 1820),

Buck, 478.

(*p*) Sect. 18.

their heirs as tenants in common. Afterwards one of the partners died intestate as to his freehold estates, leaving an infant heir. The surviving co-partners settled accounts with the executors of the deceased, and allowed them, in account, one-fourth of the value of the estate. They then contracted to sell the estate, and presented a petition under the act, praying that the infant might join in a conveyance (*g*).

Sir L. Shadwell, V. C., declined to make any order under the act; and said that a suit must be instituted for the purpose of having the infant declared to be a trustee (*r*).

A mortgagee filed a bill, and obtained a decree for sale. He afterwards died, and his heir was an infant, out of the jurisdiction. It was held that the decree had converted the ancestor, as to the legal estate in the property, into a trustee, and that the infant heir was consequently a trustee within the 8th and 18th sects. of the act (*s*).

Heir of mortgagee dying after decree for sale is within the act.

On the petition of the executors of a mortgagee (*t*) in fee, who had agreed to sell the mortgaged estate in exercise of a power contained in the mortgage deed, the infant heir of the mortgagee was held to be within the sixth section of the act, and was ordered to convey to the purchaser.

Where the conveyance would formerly have been by fine or recovery, the infant must now convey by the modes of assurance which have been substituted for those conveyances (*u*).

Conveyance by deeds substituted for fines and recoveries.

Where a female infant was ordered to convey as a trustee (*x*), and married before the conveyance, the commissioners for taking acknowledgments of married women (*y*) were directed to omit from their ordinary certificate that a married

Form of certificate, where acknowledgment of female infant has been taken.

(*g*) *Ex parte Williams*, 11 Sim. 54.

(*r*) See sect. 18.

(*s*) *Prendergast v. Eyre*, Ca. t. Sugd. 11.

(*t*) *In re Kent*, 9 Sim. 501.

(*u*) See *Radcliffe v. Eccles*, 1 Keen, 130; *Perry v. Prator*, 9 Sim. 135.

(*x*) 1 Will. 4, c. 60, s. 6.

(*y*) Under stat. 3 & 4 Will. 4, c. 74, s. 84.

woman coming before them is at the time "of full age and competent understanding," the words "full age and (z)."

Infants refusing to convey under decree, declared within the act, that another person might be appointed to convey.

Where (a), under a decree in a suit instituted on behalf of infant devisees, a portion of the testator's real estates had been sold for payment of his debts, and the infants refused to execute the conveyances, they were declared to be trustees for the purchasers within the stat. 1 Will. 4, c. 60, and were ordered to convey, in order that, if they persisted in their refusal, the Court might (b) appoint another person to execute conveyances in their names; and that the delay attendant upon the usual compulsory process might be avoided.

Exchanges not within the act;

A simple exchange of lands, or an exchange where a sum of money forms part of the consideration, by way of equality of exchange, does not come within the 16th and 18th sects. of 1 Will. 4, c. 60, so as to enable the infant heir of a man who has agreed upon an exchange, to convey (c).

Nor stock.

The Court has no jurisdiction under the act to order infants to make a transfer of stock. Infant trustees of stock are not included in any of the enabling statutes, because, if an infant happens to be appointed executor, administration *durante minore ætate* is granted to some person of full age (d).

Infants' money paid into bank.

The act provides (e), that mortgage-money belonging to infants shall be paid into the bank, subject to the disposition of the Court of Chancery (g), or to such person as the Court shall direct.

Difficulties as to heirs of mortgagees.

The 8th sect. of stat. 1 Will. 4, c. 60, enabling the Court to appoint a person to convey, in certain cases, instead of trustees and their heirs (h), did not apply to mortgagees or their heirs (i).

Construction

But stat. 4 & 5 Will. 4, c. 23, s. 2, relating to escheats and

- (s) *In re Luke*, 3 Dowl. 112. 223.
 (a) *Warburton v. Vaughan*, 4 You. & C. 247. (e) Sect. 14.
 (b) Under sect. 8. (g) Or the Court of Exchequer; but see 5 Vict. 5, and *supra*, 217.
 (c) *Turner v. Edgell*, 6 Law Journ. 201. (h) *Supra*, p. 271.
 (d) *Watts v. Scrivens*, 1 Beav. mettt, 150, 2nd ed. (i) See Sugden's Acts, by Jem-

forfeitures, refers to the section just mentioned as if it did include the heir of a mortgagee, and provides, that where a trustee or mortgagee dies without an heir, a person may be appointed to convey in like manner as is provided by the section in question, in case such trustee or mortgagee had left an heir, and it was not known who was such heir.

of later enact-
ments.

It was decided, that this enactment had the effect of enlarging the previous statute, so that the heirs of mortgagees were included within its operation (*h*). But the correctness of these decisions was doubted; and if this be the true construction, the remedy would apply to the mortgagee himself, which clearly was not intended; and this was the objection to the 6 Geo. 4, which, although it included the mortgagees, made no provision for the payment of the mortgage-money.

In order to remove the difficulty, the stat. 1 & 2 Vict. c. 69, was passed. It provides (*i*), that where any mortgagee shall have died *without having been in possession of the land, or in the receipts of the rents and profits thereof*, and the money due in respect of such mortgage shall have been or shall be paid to his executor or administrator, and the devisee, or heir, or other real representative, or any of the devisees, or heirs, or real representatives of such mortgagee shall be out of the jurisdiction, or not amenable to the process of the Court, or it shall be uncertain, where there were several devisees or representatives, who were joint-tenants, which of them was the survivor, or it shall be uncertain whether any such devisee, or heir, or representative be living or dead, or if known to be dead, it shall not be known who was his heir; or where such mortgagee, or any such devisee, or heir, or representative shall have died without an heir, or in case of neglect to convey, &c., the Court may appoint a person to convey, in like manner as, by the act of 1 Will. 4, c. 60, the Court is empowered in the place of a trustee or the heir of a trustee.

(*h*) *In re Stanley*, 7 Sim. 170; *Ex parte Whitton*, 1 Keen, 278.

(*i*) Sect. 1.

But it is also provided (*m*), that the act of 1 Will. 4, c. 60, and the 4 & 5 Will. 4, c. 23, or either of them, should not be construed to extend to any case of any person dying seised of any land by way of mortgage other than such as were *therein-before* expressly provided for.

This proviso does not, it seems, include either the case of an infant heir of a mortgagee, or the case where it is uncertain whether the mortgagee has left an heir; but it has been held, that stat. 1 Will. 4, as explained by stat. 4 & 5 Will. 4, still embraces both those cases; for the third section, it was said by the Court, was introduced into the act of 1 & 2 Vict. in order to confine *its* application to those cases which are expressly mentioned in it. That section, it was observed, was not intended to repeal any part of the two former acts, but that those acts were to be construed just as before, and the act of the 1 & 2 Vict. c. 69, was intended to apply to those cases only which it expressly provides for (*n*).

Now, the 1 & 2 Vict. c. 69, is properly confined to cases where the mortgagee has not been in possession of the land or in the receipt of the rent or profits, and the money must have been or must be paid to his executor or administrator, and without those provisions it would not be proper to invest the Court with a summary jurisdiction in such cases, nor did the acts previous to the 1 & 2 Vict. intend to give any such powers.

This decision, so far as concerns the case of its being uncertain whether a mortgagee has left an heir, was founded on what now appears to have been a misapprehension of the opinion of the Master of the Rolls; and that learned judge has since held, (in deciding that the case of a mortgagee himself being out of the jurisdiction does not come within any of the acts), that (*o*) the 3rd sect. of stat. 1 & 2 Vict. precludes the constructive

(*m*) Sect. 3.

(*o*) *Green v. Holden*, 1 Beav.

(*n*) *In re Wilson*; *In re Ga-* 207.
thorne, 8 Sim. 392.

extension of stat. 1 Will. 4 to any other case than such as were by 1 & 2 Vict. expressly provided for (*p*).

(*p*) Sir Edward Sugden remarks, already within the act, and the that "it appears to be still necessary to have an act passed to include within the 1 & 2 Vict. c. 69, the cases of an infant heir, and the cases where it is uncertain whether there is an heir, *subject to the same guards* as are provided for the cases cases of escheat will require to be reconsidered with reference to the 4 & 5 Will. 4, c. 23, and the provisions in the 1 & 2 Vict. c. 69, s. 1, coupled with the proviso." 1 Vend. & Purch. 325, n., 10th ed.

CHAPTER XXXV.

WHAT AN INFANT MAY DO.

SECTION I.

Infant Sovereign.

Acts of king
valid at law,
notwithstand-
ing infancy.

Regent usually
appointed.

Prince Albert
to be Regent
for Sovereign
under 18.

THE Sovereign cannot (*a*), in judgment of law, as king, ever be a minor, and under age; and therefore his royal grants and assents to acts of Parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. By a statute, indeed, 28 Hen. 8, c. 17, power was given to future kings, to rescind and revoke all acts of Parliament that should be made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. 6, c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. 2, c. 24. It has also been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority, and therefore he has no legal guardian (*b*).

It is provided by stat. 3 & 4 Vict. c. 52, s. 1, that if, at the demise of her present Majesty, there shall be issue of her Majesty, who shall become and be King or Queen of this realm, whilst under the age of eighteen years, His Royal Highness

(*a*) 1 Bl. Comm. 248.

(*b*) Co. Litt. 43; 2 Inst. proem. 3.

Prince Albert shall be Regent of the realm, as well as guardian (c) of the royal person, until the Sovereign shall attain the age of eighteen.

SECTION II.

Different Stages of Infancy.

THE ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen, is at years of discretion, and therefore may consent or disagree to marriage (d), and may choose his guardian (e); and at twenty-one, is at his own disposal, and may alien his lands, goods, and chattels. A female, also, at seven years of age, may be betrothed, or given in marriage (g); at nine, is entitled to dower; at twelve, is at years of maturity, and therefore may consent or disagree to marriage; at fourteen, is at years of legal discretion, and may choose a guardian (e); and at twenty-one, may dispose of herself and her lands (h).

Various stages of legal capacity in male and female.

In reckoning age, the birthday is excluded; this throws back the period of majority one day; and as "the law knows no fractions of a day," infancy ceases at the very commencement of the day preceding the twenty-first anniversary of the birth. Thus, a man who was born on the first of January, at any moment before midnight, is of age, to all intents, on the 31st of December, immediately after midnight of the 30th (i).

On what day infancy determines.

(c) *Supra*, p. 94.

c. 26.

(d) See p. 168, *supra*.

(i) 1 Bl. Comm. 463; 1 Sid.

(e) *Supra*, p. 76.

162; 1 Salk. 44; 1 Lord Raym.

(g) See p. 168, *supra*.

281; 2 Lord Raym. 1096.

(h) 1 Bl. Comm. 463, 1 Vict.

SECTION III. .

What Offices Infant may hold.

AN infant seems capable of holding (i) such offices as do not concern the administration of justice, but only require skill and diligence; and these he may execute himself, when of the age of discretion, or they may be exercised by deputy; such as the offices of park-keeper, forester, gaoler, &c. (k).

It is laid down, that an infant is not capable of an office of stewardship of the court of a manor either in possession or reversion, except where the office is granted so as to be exercisable by deputy; it is questionable whether he can be steward or registrar of the courts of a bishop (l). He cannot be a guardian (m), an attorney under a power (except to receive seisin), a bailiff, a factor, or a receiver (n).

An infant cannot hold any office of pecuniary trust. If he or his deputy should be guilty of negligence with respect to the monies placed in his hands, those to whom the money belongs might be deprived of that remedy which they ought to have against a public officer entrusted with their money, for he would not be civilly liable in either of those cases, though he might be liable for a tortious conversion of the money by himself; and if he were to conduct himself so as to be criminally liable, he would be placed in a situation of peril which the law is anxious he should avoid. For these reasons, he cannot be appointed to the office of clerk of a court of re-

(i) Bac. Abr., tit. Infancy and Age (E). 731; 2 Roll. Abr. 153; March, 41, 43; Cro. EL 636; Cro. Car. 556.

(k) Plowd. 379, 381; 9 Rep. (m) *Supra*, pp. 7, 24, 89.

48, 97; 2 Inst. 382; 3 Mod. 222. (n) F. N. B. 118; Roll. Abr.

(l) Co. Litt. 3. b.; 1 Roll. Abr. 117; Co. Litt. 172.

quests, where it is part of the duty of that officer to receive the money of the suitors (*n*).

But an infant may hold the office of clerk of the peace (*o*). He cannot be a juror (*p*), an acting executor, an administrator (*q*), nor can his concurrence (in the absence of fraud on his part) sanction any breach of trust (*r*).

He may be a private or an officer in the army or navy; he cannot be a priest, or a deacon (*s*), a barrister, attorney, or solicitor, a physician, surgeon, or apothecary.

In ancient times, minors appear frequently to have taken upon them to sit in Parliament (*t*); although it is provided by the custom and law of Parliament, that no one shall sit or vote in either house, unless he be twenty-one years of age (*u*). Doubts having arisen, from some contradictory adjudications, whether or no a minor was incapacitated from sitting in the House of Commons, it was enacted, by 7 & 8 Will. 3, c. 25, s. 8, that no person should be capable of being elected in that Infant may not sit in Parliament,

(*n*) *Claridge v. Evelyn*, 5 B. & Ald. 81.

(*o*) *Crosbie v. Hurley*, 1 Alcock & Napier, 431.

(*p*) Hob. 325.

(*q*) *Supra*, pp. 74, 342, 343.

(*r*) 3 Swanst. 87, n.; *Wilkinson v. Parry*, 4 Russ. 272.

(*s*) Stat. 13 Eliz. c. 12, 44 Geo. 3, c. 43.

(*t*) In Sir H. Cavendish's Parliamentary Debates, vol. 1, p. 420, Mr. Wedderburn is reported to have observed, that "with regard to general disqualifications in the case of minors, Prynne says, they are under the power of a guardian, and therefore unfit to make laws; but until the act of the 7th and 8th of Will. 3, they took upon them to sit." And the editors subjoin the following note:—"It appears by a

speech of Waller's, in Grey's Debates, vol. 1, p. 355, that the poet sat in parliament when he was but sixteen years of age. In Nanton's Fragmenta Regalia, there is a passage stating, that 'about the 10th of James 1, there were accounts taken of forty members not above twenty years of age, and some not exceeding sixteen.' It is also stated in Grey's Debates, vol. 1, p. 41, that Lord Torrington, son of the Duke of Albemarle, was but fourteen years of age at the time when he took part in a debate, as member of the House of Commons. See 1 Hatsell, p. 10." One of the Resolutions of the House, Nov. 27th, 1654, as to the persons to be elected, was, that they should be of the age of twenty-one years. 20 Parl. Hist. 385.

(*u*) 1 Bl. Comm. 162.

nor be elected.

or any future Parliament, who was not of the full age of twenty-one years. It has been decided, that the election and return of an infant to the House of Commons were vexatious (*x*), and that (*y*) votes given for an infant candidate, after notice of his being ineligible, were thrown away (*z*).

Cannot vote at elections.

Statute 7 & 8 Will. 3, c. 25, s. 8, enacts, that no person whatsoever, being under the age of twenty-one years, shall be admitted to give his voice at elections of any member of Parliament (*a*). And the franchise conferred by the Reform Act is restricted to males of full age (*b*).

SECTION IV.

Responsibility of Infants for Criminal Acts.

Responsibility of infant for criminal acts.

Fully responsible after 14. From 7 to 14, malice must appear.

Up to the age of seven, the law considers a child not possessed of sufficient reason to be accountable or answerable for his acts, and it is only from the age of fourteen that it holds a person to be entirely responsible. Between the ages of seven and fourteen, therefore, it is necessary that the offence should clearly testify the malicious intention of the party; in such a case only would a child be criminally responsible for his acts, and there should be some proof of malice to justify a grand jury in returning a true bill (*c*).

(*x*) Flintshire, 2 Peck, 526; cited, Rogers on Elections, p. 45, 3rd ed.

(*y*) Cockermouth, 18 Journ. 673; cited, Rogers, p. 210.

(*z*) Mr. Fox was born on the 27th of January, 1749. He was elected for Midhurst previous to August 1768; he took his seat in the ensuing Session, and made his first speech in April 1769; but after this he took little part in public

debate till January 1770; probably (as his biographer suggests), because he was not of age when returned to parliament. See the Life of Fox, in the Encyclopædia Britannica.

(*a*) See Rogers, 81.

(*b*) 2 Will. 4, c. 45, ss. 19, 20, 27.

(*c*) See 1 Bl. Comm. 464; 4 Bl. Comm. 22; Bac. Abr., tit. Infancy and Age, (B).

A marriage under the age of consent cannot, unless agreed Bigamy.
to when both parties were of age to consent, form one of the
grounds of a prosecution for bigamy; but it is otherwise if
the marriage has taken place, or has been affirmed, after both
parties were of the age of consent (*d*).

Where there is any notorious breach of the peace, such as Breach of the
peace.
a riot or battery, an infant above fourteen is as liable to suffer
fine and imprisonment for such a misdemeanor as a person of
full age.

But if the offence charged against him in the indictment be Non-feasance.
a mere non-feasance, there, in some cases, he shall be privi-
leged by his non-age, if under twenty-one, because laches
ought not to be imputed to an infant.

If there be a bridge liable to be repaired by the county in
which an infant has a house or lands by descent or purchase,
the infant must submit to an assessment on his property for
the purpose of repairing the bridge, and to distress in case
of non-payment (*e*).

If, however, the non-feasance consist in omitting to do
something which he is bound to do by reason of tenure, as
where he is bound by tenure actually to repair a bridge, and
not merely to contribute his share to a fund to be laid out by
others in repairing it; then, if there be a guardian in socage,
or other person in occupation of the land so charged, and in-
vested with command over and actual possession of the profits,
such person is criminally liable for non-repair; but if there be
no such person, there is some ground for holding that the in-
fant himself would be liable, on the ground of the public de-
triment that might result from not considering him liable (*g*).

Infants are also liable to civil actions for wrong done by
them; as for slander, embezzlement, or fraud (*h*).

(*d*) East, P. C. 468.

Res v. Sutton, 3 Ad. & Ell. 597;

(*e*) 2 Inst. 703.

S. C. 5 N. & M. 353; *supra*, p.

(*g*) See 4 Bl. Comm. 23; Bac. 40.

Abr., Infancy and Age, (G); and

(*h*) See the next chapter.

SECTION V.

Testimony of Infants.

Testimony of
infants.

THERE is no precise age fixed (*h*) at which children are excluded from giving evidence. At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that none could be admitted under the age of nine years, very few under ten (*i*), which in some cases would operate to deprive them of the protection of law against acts of violence (*k*). A more reasonable rule has since been

Their competency tested by
their intelligence.

adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. In *Brazier's case*, on an indictment for assaulting an infant five years old, with intent to ravish her, all the Judges agreed, that children of any age might be examined upon oath, if they were capable of distinguishing between good and evil, and possessed of sufficient knowledge of the nature and consequences of an oath; but that they could not in any case be examined without oath (*l*). This is now the established rule, as well in criminal, as in civil cases, and it applies equally to capital offences, and to offences of an inferior nature.

They cannot be
examined without
oath.

They must have
received religious
instruction.

According to this rule, the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received a certain share of religious instruction. A child, whose intellect appears to be in other respects sufficient to enable it to

(*h*) *Phillipps on Evidence*, p. 5, Hale, P. C. 302; 2 Hale, P. C. 278. 8th ed. (*k*) B. N. P. 293.

(*i*) *Rex v. Travers*, Stra. 700; (*l*) *East*, P. C. 443; B. N. P. and cases in *East*, P. C. 442; 1 293; 4 Bl. Comm. 2

give useful evidence, may, from defect of religious instruction, be wholly unable to give any account of the nature of an oath, or of the consequences of falsehood. In criminal cases, where a child, who is a necessary witness for the prosecution, appears not sufficiently to understand the nature and obligation of an oath, a judge may, in the exercise of his discretion, and for the purposes of justice, postpone the trial, in order that the child may be in the meantime properly instructed (n). But an application to postpone the trial upon this ground ought properly to be made, before the child is examined by the grand jury; at all events, before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the Judge cannot discharge the jury, but should direct an acquittal (o).

Trial postponed, that child may be instructed.

When a child, from defect of understanding or instruction, is unfit to be sworn, it follows as a necessary consequence, that any account which it may have given to others of the transaction ought not to be admitted. On an indictment, therefore, for a rape on a child five years old, where the child was not examined, but an account of what she had told her mother, about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally, as was supposed, on that evidence; the Judges, in a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned (p).

Statement by child, who cannot be sworn, not admissible.

With regard to the weight and effect of the testimony of

(n) See *Rex v. Williams*, 7 Car. & P. 320.

(o) *Rex v. Wade*, 1 Ry. & Mo. C. C. 88. In this case the witness was an *adult*, possessed of sufficient intellect, but wholly without religious instruction. Mr. Phillipps questions the exercise of the discre-

tion of the Court in postponing the trial in a case of this nature.

(p) *Rex v. Tucker*, 1808, cited Phill. Ev. p. 6; see also *Rex v. Brazier*, 1 East, P. C. 443; 1 Atk. 29; C. J. Jeffreys' examination of a child, previously to being sworn; 9 How. 1148; Mr. Hume's re-

Weight due to
their testimony.

children, Sir W. Blackstone observes (*g*), "That when the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion."

To this, Mr. Phillipps replies (*r*), that in many cases, undoubtedly, the statements of children are to be received with great caution; and it may be observed, the preliminary inquiry, made with the view of ascertaining their competency, is not always of the most satisfactory nature, but is sometimes of such a description, that, by a very slight discipline of the memory, a child might thus be made to appear a competent witness. The inquiry is usually confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment of perjury. In a recent case, however, it has been held, that the effect of the oath on the conscience of a child, should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial (*s*). Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive. It is clear, that a person may be legally convicted upon such evidence alone and unsupported; and

marks on the law of Scotland, respecting the admissibility of infants.

12 How. 559, n.

(*g*) 4 Comm. 214.

(*r*) Phillipps on Evidence, p. 6, 8th ed.

(*s*) *Rex v. Williams*, 7 Car. & P. 320.

whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.

SECTION VI.

Of the Capacity of Infants generally.

AN infant is capable of taking an estate by descent or by purchase, and of receiving seisin either in person or by attorney. Copyholds may be surrendered to his use, and he may be admitted to them (*t*), and chattels may be presented to him (*u*). In all these cases the donor is bound by his own act.

Infant may take by descent or purchase.

But any gift to an infant may be waived by him, at his absolute discretion, when he comes of age (*x*), because it may be more advantageous for him to be without the property, since the incumbrances on land given in fee, or the rent reserved on a lease, may be more than the value; and his heirs may waive the grant, if he has not lived to agree to it (*y*).

If an infant continue in possession, after his full age, of land leased to him during his infancy, he affirms the lease, and shall be liable to the arrears of rent incurred before. For as possession is given him, and a right to the estate, it is uncertain in its constitution whether it may be for his benefit or

Lease made to infant affirmed by his continuing in possession after 21.

(*t*) Co. Cop. a. 35; see p. 326, 586. As to the question whether a man might waive, at full age, a peerage granted during infancy, see *supra*.

(*u*) 1 Sid. 129; 7 Car. & P. 402. age granted during infancy, see

(*x*) Co. Litt. 348. b.; 3 Sugd. *The Duke of Queensberry's Case*, 1 V. & P. 222, 10th ed. P. W. 582, 592.

(*y*) Co. Litt. 2. b. 3. b.; 1 P. W.

not, and therefore it is not void in its creation, and may acquire validity by his continuance after full age (*z*).

It is said, that an infant may do homage but not fealty (*a*), and that he cannot perform grand serjeanty at the coronation (*b*).

Infant may do of his own accord whatever he is compellable to do.

An infant (*c*) may, generally speaking, do of his own accord, as completely and irrevocably as a person of full age, any right and lawful act which he is compellable by any means or in any way to do (*d*).

Examples.

Thus he may admit a copyholder, he may pay rent, his attornment to a grant by deed only was good, where he was compellable to attorn if a fine had been levied (*e*).

Before the guardian in chivalry entered, the heir might assign dower to the widow of the ancestor ().

Where partition binds infants.

The cases in which partition is or is not binding upon infants, are thus laid down by Lord Coke:—

Effect of unequal partition in the Chancery ;

“ A partition (*h*) in the Chancery where one coparcener is of full age and *sueth livery* ” (that is the delivery of her lands held in chivalry out of the guardian’s hands (*i*)), “ and one other is within age and hath an unequal part allotted to her, this shall not bind her at full age ; for in a writ directed to the escheator to make partition there is a *salvo jure*, and there is no judgment upon such a partition.”

“ And this partition may be avoided either by *scire facias* in the Chancery, or by a writ *de partitione faciendâ* at the common law, at her full age.”

—of equal partition.

“ If the partition be equal at the time of the allotment it shall bind him for ever, because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendâ*.”

(*z*) 1 Roll. Abr., *Enfanta*, (K) ;
Cro. J. 320 ; 2 Bulstr. 69 ; see 3
M. & S. 481.

(*a*) Co. Litt. 65. b.

(*b*) Ibid. 107. b.

(*c*) See 3 Burrow, 1801.

(*d*) Co. Litt. 172. a.

(*e*) *Conny's case*, 9 Rep. 85 b. ;
Co. Litt. 315. a.

(*g*) Co. Litt. 35. a.

(*h*) Co. Litt. 171. a.

(*i*) See 2 Bl. Comm. 68.

" And (*k*) though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry, for if he take the whole profits of the unequal part, after his full age, the partition is made good for ever."

Confirmation of voidable partition.

" But a partition made by the king's writ *de partitione faciendâ* by the sheriff by the oath of twelve men and judgment thereupon given, shall bind the infant, though his part be unequal," because it is made by authority of law.

Partition by the sheriff.

" Partition at law and in equity," says Lord Redesdale (*l*), "are different things. The first operates by the judgment of a Court of law, and delivers up possession in pursuance of it, which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyances, the partition cannot be effectually had."

Distinction between partition at law and in equity.

The proper mode of effecting partition is by bill in equity (*m*).

The acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding (*n*). An infant patron may present or nominate to a benefice; otherwise there will be a lapse; and no public inconvenience can arise, since the bishop is to judge of the qualification of the clerk presented (*o*): an infant peer may qualify chaplains (*p*): an infant head of a corporation may join in corporate acts: an infant may be attorney for the purpose of delivering seisin (*q*): an infant officer may perform the duty of an office which he may hold.

Infant may perform acts taking effect from a mere authority. Examples.

An infant cannot appoint an attorney for any purpose whatever, except to receive seisin, or (under stat. 1 Will. 4,

Infant officer may perform duty of office.

Infant cannot appoint an attorney, ex-

(*k*) Co Litt. 171. b.

(*o*) *Supra*, p. 32; Co Litt. 246. a.,

(*l*) 2 Sch. & Lef. 372; and see 344. b.; 3 Atk. 710.

Tuckfield v. Buller, Set. Decr. 276.

(*p*) 4 Rep. 119.

(*m*) *Supra*, pp. 340, 386, 425.

(*q*) Co Litt. 52. a.; 3 Atk. 710;

(*n*) 3 Burr. 1802.

1 Ves. 304.

cept to receive
seisin.

c. 65 (*p*),) to take admittance to copyholds on his behalf (*q*), nor can he execute any deed which delegates a mere power and conveys no interest (*r*).

How far gift of
chattel by in-
fant is valid.

It seems that an infant's delivery of a chattel with his own hand is so far valid, that he cannot maintain an action for trespass if it is taken away, though he may recover it in an action of account (*s*); but that if he gives it without delivery, and the donee takes the chattel by virtue of the gift, trespass may be maintained (*t*).

Lord Mansfield is reported to have said (*u*), that if an infant pays money with his own hand, without a valuable consideration, he cannot get it back again; and also, that if he receives rents, he cannot demand them again when of age: but the report must be considered inaccurate, for the latter proposition is at variance with all the principles of the law of infancy; and the former, if correct at all, applies only to infants who have attained to years of discretion.

Infant may per-
form beneficial
condition.

At common law, before the Statute of Uses, an infant might perform a condition where it was for his benefit (*v*); as, if he had an estate on condition of making a feoffment of part of it to J. S. (*w*).

Land may be
lost by breach
of condition
during infancy.

If (*x*) an estate is given to an infant upon condition to be performed by him, and the condition is broken during his infancy, the land is lost for ever; and therefore his guardians ought to be active in performing it (*y*).

Conditions in
law and in fact.

A condition may be either a condition in fact, that is, expressed, as, to pay money, or to do, or not to do some other act; or a condition in law, that is, implied.

(*p*) *Supra*, p. 326.

v. Drury, 2 Ed. 72.

(*q*) 3 Burr. 1804, 1808.

(*s*) 3 Atk. 710.

(*r*) *Infra*, p. 487.

(*w*) 1 Ves. 304.

(*s*) Bac. Abr., tit. Infancy and Age, (I); Perk. 12, 19; 1 Roll. Abr. 730; 2 Roll. Rep. 408; Latch, 10.

(*x*) *Whittingham's case*, 8 Rep. 88; Co. Litt. 233. b.

(*t*) Perk. s. 14.

(*y*) See *Vernon v. Vernon*, *supra*, pp. 284, 340.

(*u*) In *Earl of Buckinghamshire*

Conditions in law are of two natures, viz. by the common law and by the statute.

Conditions in law are either at common law or by statute.

There are two sorts of conditions in law by the common law: one of which is founded upon confidence and skill; the other, without confidence and skill. As to the former sort, if the office of a parker, a steward, &c., is granted or descends to an infant, and if the conditions in law attached to this office, which require skill and confidence, be not observed, the office is lost for ever: and the same law holds as to liberties and franchises. As to the latter sort of conditions in law by the common law, if the infant be lessee for life, or tenant by the curtesy or in dower, and aliens in fee, and the lessor enters for the forfeiture, as he may, yet this is no absolute forfeiture of the infant's estate, and he or she may enter; for the condition broken was a mere condition in law, without any skill and confidence annexed to the estate.

Two kinds of conditions at common law.

Conditions in law by statute law are also of two qualities (z); where the statute gives recovery, and where the statute gives an entry and no recovery. Under the first head an infant was bound for ever by a recovery had against him in an action of waste. For if an infant be tenant by the curtesy, or lessee for life or years, he shall answer not only for waste committed by himself, but also for permissive waste, or waste committed by a stranger; for the privilege of infancy cannot prevail in a matter that would be a wrong and disherison to him who has the inheritance: and in the last case, the infant has his remedy over against the wrongdoer (a).

Two kinds of conditions by statute.

Infant forfeits by waste.

But where the statute gives an entry only and no action, as if an infant aliens in mortmain, there, although the lord of whom the land is held enters, yet the right of the infant is not barred (b).

(s) Co. Litt. 233. b.; 2 Inst. 483; Godb. 365. (b) See *Cary v. Bertie*, 2 Vern. 343.

(a) 2 Inst. 703.

How far conditions in restraint of marriage are supported.

Ages at which infants could formerly make will of personality.

Infant cannot now make a will.

Infant father may appoint guardians by deed.

Re-publication at full age of will made under age.

Although conditions in restraint of marriage are, generally speaking, invalid, and can have no effect unless there be a gift over in the event of breach or non-performance; yet conditions restraining marriage under the age of twenty-one, or any other reasonable age, without the consent of certain persons, are valid and legal conditions, and effect will be given to them whether there be a disposition over or not (c). .

Up to the 1st day of January, 1838, male infants of the age of fourteen and upwards, and females of twelve and upwards, were capable of making a will of personal estate (d); and a father, though under age, could by deed or will appoint guardians for his children under stat. 12 Car. 2, c. 24. But by stat. 1 Vict. c. 26, which came into operation on the day just mentioned, no person under the age of twenty-one can make any testamentary disposition whatever; the act, however, does not take from infant (e) fathers the power of appointing guardians by deed.

If (g) at any time before the statute came into operation, an infant at 14, if a male, or 12, if a female, by approval or recognition, or other means, re-published a will made under those ages, the will was thereby made effectual. The same rule seems applicable to the re-publication at 21 of a will made under that age (h); but it would seem that such republication ought to be attended with all the formalities of execution.

(c) *Hemmings v. Muncley*, 1 pp. 14, 160.

Bro. C. C. 303; *Scott v. Tyler*, 2 Bro. C. C. 431; S. C. 2 Dick. 712; *Stackpole v. Beaumont*, 3 Ves. 89; *Clifford v. Beaumont*, 4 Russ. 325; see Williams on Executors, 1010, 3rd ed.

(d) 2 Bl. Comm. 463, 497; *Anon.*, Mosely, 5; see 2 Eden, 55.

(e) *Supra*, p. 83.

(g) *Herbert v. Torball*, 1 Sid. 162; Com. Dig. Est. by Dev.

(E. 3); Williams on Executors,

(h) The stat. enacts (s. 34), that "every will re-executed or re-published, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived;" but these words would probably be held to apply only to wills made before the 1st day of January 1838.

SECTION VII.

Alienation by Matter of Record.

It is laid down generally, that persons under the age of twenty-one cannot bind themselves by any deed, or alien any land, goods, or chattels (*g*).

General rule against validity of infant's deed or alienation.

But this rule is subject to many exceptions and qualifications.

Exceptions.

In the first place, acts of infants which are matters of record demand consideration.

Matters of record.

An infant could not properly be conusor in a fine; but if the judge or commissioners, whose duty it was to see that persons acknowledging fines before them were of full age, and who were liable to be fined if they neglected their duty (*h*), permitted an infant to levy a fine, it was presumed that he was of full age, and he could not impeach the fine, on the ground of his disability, in the Court in which it was levied (*i*). But if he brought a writ of error in a superior Court during his minority, the fact of infancy was tried, not by jury, but by inspection of his person in open Court; and the judges might require his appearance for that purpose, examine him or his relatives, and inform themselves by any kind of evidence (*k*). If upon inspection he was found not to be of full age, the fine was reversed: and when it had once been adjudged and recorded upon such an inspection that he was within age, then though he attained his full age or died before the fine was reversed, yet he or his heirs might reverse it at any time afterwards (*l*): and where the engrossment of the fine was delayed until the infant's full age, with a view

Infant could not properly be conusor in fine.

Fine, if taken, only impeachable by writ of error, and during minority.

Fact of infancy tried by inspection.

Effect of recording age upon inspection.

Inspection granted with-

(*g*) Co. Litt. 171. b.

(*k*) 9 Rep. 31; 2 Roll. Abr.

(*h*) See 12 Mod. 444.

573.

(*i*) Co. Litt. 131. a., 380. b.; 12 Rep. 123; Hob. 224; 3 Atk. 711; 5 Cru. Dig. 127, 4th ed.

(*l*) Co. Litt. 131. a., 180. b.; *Keckwick's case*, Sir. F. Moo. 844.

out writ of
error.

to prevent her from bringing a writ of error, an inspection was granted, and her infancy recorded, shortly before she came of age, so as to enable her to defeat this design (*m*). So, where there was a protection, which rendered it impossible to proceed in the cause against the conusee, the infant might be inspected under age, and the fine avoided whenever the protection ceased (*n*).

Fine could not
be impeached
after majority.

But if the fine was not called in question, and the infancy of the conusor established by inspection, while he was still under age, the fine could not afterwards be impeached, but was presumed, upon the credit of the judge or commissioners, to have been levied by a person of full age (*o*).

Fine to make
tenant to the
præcipe.

It seems that an infant could make a tenant to the *præcipe* by fine (*p*).

Declaration of
uses of fine
co-extensive
with fine.

If an infant levied a fine and executed a deed to declare the uses of it, the declaration of uses was valid as long as the fine was unreversed; for, though the deed was a matter in *pais*, which may in general be avoided by an infant at any time after his full age (*q*), yet being made in pursuance of, and being incident to, the fine, it was necessarily allowed to stand while the fine itself remained in force (*r*).

Fine by infant
and adult re-
versed as to
infant only,
and no for-
feiture.

Where tenant for life and infant in remainder levied a fine, the infant reversed the fine as to himself for the inheritance for non-age: yet he was bound by his assent to the fine and joining in it not to enter for the forfeiture; and the fine was held good as to the estate of the tenant for life, and reversed *quoad* the infant only (*s*). For it has always been a principle, that the privilege of infancy shall not be turned into an offensive weapon of fraud and injustice.

Recovery by

An infant was not entitled to suffer a common recovery in

- (*m*) *Griffith's case*, 12 Mod. 444. b.; Hob. 224, 234; 3 Atk. 710; 1
(*n*) Co. Litt. 131. a., 180. b. Ves. 304; 1 Roll. Abr. 730, (F),
(*o*) Co. Litt. 131. a., 380. b.; 12 pl. 3; 2 Saund. 96, n.
Rep. 122, 123; Hob. 224. (*s*) *Pigot v. Russell*, 2 Leon. 108;
(*p*) *Pigott on Recoveries*, 65. S. C. Cro. Eliz. 124; see 3 Burr.
(*q*) 2 Inst. 673. 1802.
(*r*) 2 Rep. 58 a.; 10 Rep. 42

person, and if he did so, it might, like a fine, be reversed during his minority by writ of error, upon inspection; but if not so reversed, could not afterwards be called in question (*t*).

infant in person liable to be reversed during infancy.

A deed executed by an infant for the purpose of declaring the uses of a recovery stood exactly upon the same footing as a deed to declare the uses of a fine (*u*).

Deed to lead the uses.

If an infant suffered a common recovery, in which he appeared by attorney, he might reverse it at any time after he attained his full age, for he had no remedy against the attorney, if he was prejudiced by the recovery. It might be tried by a jury whether he was an infant or not when he appointed the attorney, as that was not an act sanctioned by the assent of judges or commissioners so as to raise the presumption of his being of full age (*x*).

Recovery by attorney might be reversed at any time.

Age at appointment of attorney tried by jury.

It was doubted in ancient times (*y*), whether a recovery bound an infant who appeared by his guardian, but it was afterwards settled, that if an infant appeared by guardian and vouched the common vouchee, and so suffered a recovery, it could not be reversed for error. If the recovery was to the infant's prejudice, he had his remedy against the guardian (*z*).

Recovery by guardian valid.

Remedy against guardian.

The practice was, when an infant intended to suffer a recovery, that he and his guardian petitioned the king to grant letters under the privy seal to the judges of the Court of Common Pleas, directing them to permit the infant to suffer a common recovery. But it was still in the discretion of the judges to permit the infant to suffer it or not, according to the circumstances of the case. If upon examination they found a recovery to be necessary or advantageous for the infant, (as

Privy seal to suffer recovery.

Discretion of judges in giving permission.

Admission of guardians.

(*t*) Co. Litt. 380. b.; 2 Inst. 484; *Stokes v. Oliver*, 5 Mod. 209.

1 Sid. 321; 1 Lev. 142; Pig. 166; (*y*) 10 Rep. 43 a.

1 Mod. 49; see 7 Taunt. 697; 5 (*z*) Cro. Car. 307; Hob. 190; Cru. Dig. 348, 4th ed. 1 Sid. 321; Cro. Eliz. 472; Sir W.

(*u*) See p. 462, *supra*, notes (*q*) Jo. 318; 1 Roll. Abr. 731, (G), and (*r*). pl. 1; Pig. 64; 2 Saund. 94 c.;

(*x*) Sid. 321; 2 Roll. Abr. 573, Ibid. 96, (n). pl. 8; 1 Roll. Abr. 755, pl. 6;

for the payment of debts, or for resettling a family estate on the marriage of the heir under age), they admitted persons of known integrity and fortune to appear as his guardians, and to join with him in suffering a recovery in Court (a). But they refused permission where the reasons for the recovery did not appear sufficient (b),—as, where an infant wished to disinherit his sister who had made a low marriage (c).

How tenant to the *præcipe* was made.

When an infant was permitted to suffer a common recovery with double voucher, it was necessary for him to make a tenant to the *præcipe*, either by fine (d), or by feoffment, giving livery of seisin in person, by which means the feoffment was only voidable; whereas if he appointed an attorney to give livery of seisin for him, the feoffment would be absolutely void (e).

Private acts substituted for privy seal.

But common recoveries suffered by privy seal were subsequently disused, and private acts of Parliament were universally substituted in their stead.

Recognisance voidable during minority.

A recognisance which an infant has entered into, is, like fine and recovery, a judicial act, and must be avoided (if at all) during minority; by *audita querela*, says Lord Coke, who places recognisances, statutes merchant and of the staple, obligations in the nature of a statute staple, or obligations enrolled as matters of record, all upon the same footing: “for,” he adds, “it must be tried by inspection, and these concern but personal duties (g).”

Bargain and sale inrolled is void, *semble*.

“But,” continues Lord Coke, “if an infant bargain and sell lands, which are in the realty, by deed indented and inrolled, he may avoid it when he will, for the deed was of no effect to raise a use.”

(a) *Blount's case*, Hob. 196; *Sir H. Mackworth's case*, 1 Vern. 461; 1804.

see 2 Salk. 567.

(b) 1 Lord Raym. 113.

(c) *Sir J. St. Alban's case*, 2 Salk. 567; see Turn. & Russ. 175. 1805.

(d) Pig. 65.

(e) Perk. s. 12, 13; 3 Burr.

(g) 2 Inst. 673; Co. Litt. 380. b.

(h) 2 Inst. 674; Cro. Jac. 364;

Loyd v. Eagle, Carth. 278; 3 Burr.

SECTION VIII.

Of Alienation by Acts not of Record.

AMONG acts not of record, a feoffment stands first.

A feoffment with livery of seisin made by an infant in person, and not by attorney, is not void,—for (i) it is in the first instance presumed, that the witnesses would not attest if they saw the feoffor to be an infant (k),—but is voidable, and the infant may enter within age to revest his possessory right, for the sake of the profits, but still the feoffment continues (in the opinion of Lord Mansfield) (l) to be voidable only, and he may elect to confirm it, when he attains his full age. Or he may at any time after his full age enter, or put in force the usual remedies for the recovery of land; and a writ of *dum fuit infra ætatem* (m) lay for him at that period (n). But he could not bring any writ analogous to a *dum fuit infra ætatem* during his minority; and the reason was, that his election might not be bound by the judgment (o).

Feoffment with livery, by infant in person, is only voidable.

How it may be avoided; by infant;

If (p) the infant does not live to confirm or adopt at full age the feoffment which he made during his minority, it may be set aside by persons who are privy to him in blood; by his heir general, if it is ordinary socage land which he held in fee; or by the heir special, as the heir in tail, or the heir in borough English; for a right to enter on account of the infancy of the ancestor, goes to the person who suffered by the infant's act, and is not like conditions, warranties, and

by heir.

(i) Bro. Abr., tit. Coverture and c. 27, s. 38.

Infancy, pl. 1; Litt. sect. 259; (n) Co. Litt. 247. b., 248. a., Co. Litt. 171. b.; *Whittingham's* 337. b.

case, 8 Rep. 84.

(o) Burr. 1808.

(k) Burr. 1804.

(p) *Whittingham's case*, 8 Rep.

(l) Ibid. 1808.

84; Co. Litt. 337. b.

(m) Abolished, 3 & 4 Will. 4,

estoppels, which descend to the heir at the common law. But a person, who is privy in estate only, and not in blood, cannot set it aside.

Lord has no benefit of escheat.

If there be lord and infant tenant, and the infant makes a feoffment in fee, and executes it by livery of seisin by his own hands, and afterwards dies without heir, the lord cannot take any benefit of escheat (*q*).

Feoffment to guardian void, *semble*.

It is said that if an infant enfeoffs his guardian, this is absolutely void, for the apparent prejudice it must be to the infant (*r*).

Effect of feoffment by infant joint-tenants ;

If two joint-tenants, being within age, join in a feoffment in fee, a joint right remains in them ; and therefore if one dies, the whole right accrues to the survivor, and he may enter in respect of it (*s*).

—by one of infant joint-tenants ;

Lord Coke (*t*) states, that if one of two infant joint-tenants makes a feoffment in fee and dies, the right does not survive, because the jointure was severed for a time.

In a case (*u*) where it was contended that certain articles which an infant joint-tenant had entered into on her marriage, amounted in equity to a severance of the joint-tenancy, Lord Chancellor Bathurst said that it would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint-tenancy ; as, if that were allowed, it would always be in the power of the infant to say whether the joint-tenancy should be severed or not ; then, if any of the co-joint-tenants should die under age, the infant might avoid his own act, by pleading *infra etatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the co-joint-tenants (*v*).

—by adult and infant joint-tenants ;

Lord Coke lays down the following doctrines (*w*) :—If two joint-tenants, one of full age, and the other under age, join

(*q*) *Whittingham's case*, 8 Rep. 84. (*t*) *Ibid*.

(*r*) 35 Ass. 8 ; 1 Roll. Abr. 728 ; 246. a., n. (1). (*u*) *May v. Hook*, Butl. Co. Litt.

see Chapter 23, *supra*.

(*v*) See 2 Atk. 480.

(*s*) 8 Rep. 85 ; Co. Litt. 336. b. (*w*) Co. Litt. 337. b.

in a feoffment, and the one who is of full age dies, the infant shall have his remedy only for the moiety.

If an (x) heiress has a husband within age, and he makes a feoffment of her land in fee and dies, the wife may enter.

Consequences of alienation by infant husband of his wife's estate.

If there be husband within age and wife tenant in tail general, and the husband makes a gift in tail and dies within age, the wife may enter. Or the heir of the husband may enter in respect of the new reversion descended upon him, but his entry restores the wife's estate.

If husband and wife, both within age, by indenture join in feoffment reserving rent, and the husband dies, the wife may enter or she might have had a *dum fuit infra ætatem*. But if the wife had been of full age, she could not have had a *dum fuit infra ætatem* for the non-age of her husband.

As to the effect of conveyances by acts not of record, other than feoffments with livery of seisin, there has been a conflict of opinions.

Conveyances by acts not of record, other than feoffments with livery.

It has been laid down that an infant may execute a deed for his own benefit, and if upon the face of a transaction there be any semblance of benefit to the infant, the deed is not void but only voidable (y).

Infant may execute deed for his benefit.

With regard to exchange, Lord Coke says, that "if an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect; for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompense) but voidable (z)."

Exchanges only voidable.

As to the effect of the execution and delivery of a deed by an infant, independently of all considerations of benefit, Lord Mansfield, in a case (a) which had been elaborately argued, examined all the authorities and pronounced the opinion of the Court of King's Bench, (which, however, was not necessary

Deed delivered by infant is only voidable, *semble*.

(x) Co Litt. 337. a.

(a) *Zouch v. Parsons*, Burr.

(y) Burr. 1808; 5 B. & Ald. 759. 1794.

(z) Co. Litt. 51. b.

to the determination), that such execution and delivery is an act not void but only voidable, like feoffment with livery of seisin.

Distinction between things taking, and things not taking effect by delivery.

Perkins lays it down (*b*), that, "all such gifts, grants, or deeds made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants, or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate." Lord Mansfield adopted this statement of the law; and observed that the words "which do take effect," are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest.

Authorities for the position that deed delivered by infant is not void.

He noticed some authorities (*c*) which tend to shew that the delivery of a deed is only voidable; and he remarked, that the delivery of the deed must be in the presence of witnesses, as much as the livery of seisin, and that the presumption that the witnesses would not attest if they saw the person conveying to be an infant, holds equally as to both: that an infant, or they who stand in his place, cannot plead "*non est factum*," and give the infancy in evidence; but they must plead the infancy specially to avoid the deed, and that plea avoids it, by relation back to the delivery; the reason being, because it has an operation from the delivery; and not because it has the form of a deed: that the deed of a *feme covert* on the other hand has the form, but she may plead "*non est factum*," because it has no operation (*d*). He also cited from Perkins (*e*) the doctrine, that, if an infant make a deed and deliver it, and afterwards, at full age, deliver it again as his deed, the second delivery is void: whereas deli-

(*b*) Sect. 12.

(*c*) Bro. Abr., tit. *Dum fuit infra etatem*, pl. 1; citing 46 E. 3, 34; Litt. sect. 259; 2 Inst. 673.

(*d*) See the observations of Eyre,

C. J., in the case of *Keane v. Boycott*, 2 H. Bl. 515; which, however, were made with reference to contracts.

(*e*) Sect. 154.

very by a married woman is merely void, and a second delivery after the determination of the coverture is effectual.

In the case which gave rise to this discussion (*g*), the infant son and heir of a mortgagee was joined with his own mother as executor and residuary legatee. Upon payment to his mother of the mortgage-money, he conveyed the mortgaged lands by lease and release to a new mortgagee by direction of the mortgagor; and, afterwards, being still under age, he made an entry to defeat this conveyance.

Reconveyance by infant heir of mortgagee by lease and release only voidable.

It was considered that the infant in re-conveying, had done no more than he was compellable by statute to do as a trustee (*h*); that the conveyance was an act in the nature of an execution of a mere authority; that it would be iniquitous to suffer him to avoid it, after money had been advanced on the faith of his concurrence; that independently of the effect of the solemn delivery, the money received and the other circumstances of the transaction shewed a semblance of benefit sufficient to make it voidable only upon the matter of the conveyance; and that, being voidable, neither the infant nor any one for him could elect to avoid it during minority, and consequently it had not been avoided by his entry. The Court of King's Bench was unanimous in this decision, and it has been recognised by Lord Eldon. "The Court held," said his Lordship (*i*), "that, as the co-executor has a right to receive the money, and can give a discharge for it, and that payment would be good against the infant, he is a dry trustee. That is expressly stated as one ground of the judgment in that case, that the infant was an infant trustee within the statute; but the Court said farther, that his conveyance at all events would be only voidable: and though it is true, that, where an infant conveys as a trustee within

Transaction, wearing semblance of benefit, is voidable;

and cannot be avoided during infancy.

Trustee would be prevented in equity from

(*g*) *Zouch v. Parsons*, Burr. 435, *supra*.
 1794; Hargr. Co. Litt. 51. b., (*i*) — *v. Hancock*, 17 Ves.
 n. (3). 383; See Hargr. Co. Litt. 71. b.,
 (*h*) 7 Ann. c. 19, s. 2; see p. n. (3).

avoiding void-
able convey-
ance made
during infancy.

the statute, not being so, he will not be bound by his conveyance under such an order, yet if it is a case in which he would be bound to convey when of age, his conveyance being voidable only during his infancy, and, until avoided, passing the legal estate, and no one having a right to elect for him, whether it should be void or not, he would, when he became adult, be placed in such a situation, that, if he sought at law to avoid his deed, a Court of equity would prevent him (j)."

Conveyances
by infants not
practically re-
lied on.

It seems, however, to be beyond the province of a Court of law to notice a trust or the equitable nature of a transaction; and it has not been the practice to rely upon the conveyances of infants to the degree which the decision in the case of *Zouch v. Parsons* would warrant.

SECTION IX.

Of Leases.

Infant's lease,
reserving rent,
is only voidable.

LAYING out of view the modern enactments, by which infants are enabled, in person or by their guardians, to grant, to surrender, and to take leases, under the sanction of the Court (k); it may be stated that if an infant make a lease for years reserving rent, it is only voidable, and if he accept rent at full age, he cannot afterwards avoid it; because a lease rendering rent imports on the face of it a benefit to the infant, and his accepting the rent at full age is conclusive that it was for his benefit (l).

Infant's lease
by deed is only
voidable;

In former times, some writers made a distinction between leases by infants with reservation of rent and those which

(j) Mr. Preston in his treatise under any circumstances, convey by on Conveyancing, vol. 2, pp. 248, lease and release. See 2 Inst. 673; 375, impugns the decision in *supra*, p. 464; Co. Litt. 306. a. *Zouch v. Parsons*, and states that (k) See chap. 28, *supra*. Lord Eldon disapproved of it; and (l) *Ashfield v. Ashfield*, Sir W. Jo. 157; see 3 M. & S. 481. he considers that an infant cannot,

contained no such reservation; but Lord Mansfield (*m*) denied this distinction, and said that it had been long settled, that an infant may make a lease without rent, to try his title. He remarked that very prejudicial leases may be made, though a nominal rent be reserved, and that there may be very beneficial considerations for a lease though no rent be reserved. He also remarked that the lessee can in no case avoid the lease on account of the infancy of the lessor; which shews it not to be void, but voidable only. His Lordship is, however, to be understood as speaking of leases by deed, and not of parol demises.

it cannot be avoided by the lessee.

A lease which is absolutely void cannot, like a voidable lease, be made good by acceptance of rent after full age.

In a case which was decided on the ground that an infant who becomes entitled to the reversion of an estate leased from year to year, cannot eject the tenant without giving the same notice as the original lessor must have given (*n*), it appeared that a demise had been made by the plaintiff himself under age, and Mr. Justice Buller took occasion to say, that an infant cannot avoid a lease which is for his own benefit; and he quoted a *dictum* of Lord Mansfield, (which he said Lord Hardwicke also had adopted), that infants are bound by contracts beneficial to themselves. But the better opinion is, that such leases are voidable.

Lord Mansfield, in the case of *Zouch v. Parsons*, after noticing the cases cited in support of the position, that an infant's surrender, by deed, of a lease, is absolutely void (*o*), declared "that he knew of no judgment upon the ground that such a surrender is void. Most undoubtedly, the other party cannot say so. If an infant was to surrender an unprofitable lease, and after acceptance, the premises should be burnt,

Surrender of lease only voidable.

(*m*) 3 Burr. 1806; See Hargr. 159.
Co. Litt. 45. b., n. (1); Co. Litt. 308. a.; Bac. Abr., tit. Infancy and Age, (1) 3.
(*o*) *Lloyd v. Gregory*, Cro. Car. 502; S. C. Sir W. Jones, 405; *Thompson v. Leach*, 3 Mod. 310.

(*n*) *Maddon v. White*, 2 T. R.

overflowed, or otherwise destroyed, the lessor never could say the surrender was void. There is no instance where the other party to a deed can object, on the ground of infancy. Consequently, the infant may let the surrender stand, or avoid it; which proves it to be voidable only."

Deed might be held void, where it would work a forfeiture, *semble*.

He added (speaking, it would seem, of deeds in general), that if a new case should arise, where it would be more beneficial to the infant, that the deed should be considered as void; if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a third person, unless it was deemed void;—the reason of the privilege (which exists for the protection of infants) would warrant an exception, in such case, to the general rule (*p*).

SECTION X.

Of Customary Rights.

Tenant in gavelkind may alien at 15.

Where, by feoffment.

Where, by releases.

AN infant tenant in gavelkind (*q*), of either sex, may alien the land at fifteen, the age at which the customary guardianship terminates. But the alienation must be, if the infant is in actual possession and seisin of the land, by feoffment, with livery made with the infant's own hand, and not by attorney. Nor did the custom enable the infant to make a will of his lands at fifteen; nor can he grant a reversion on a subsisting estate for life, for that lies not in livery.

If the infant is not in actual possession and seisin of the land, the custom warrants him in releasing his own right in the lands to the person who is in possession of the freehold; as, to his guardian holding over (*r*), or to a tenant for life, or

(*p*) See Co. Litt. 233. b.; *Ashfield v. Ashfield*, Sir W. Jo. 157. (*q*) See Robinson on Gavelkind, book 2, chap. 3, 3rd ed., and notes. An infant might have surrendered leases in a court of equity, in order to take a renewal, by 29 Geo. 2, c. 31. (*r*) Co. Litt. 57. b.; but see p. 465, *supra*.

to one who has seisin already for a defeasible estate. Whether the custom extends to support a warranty by an infant, is doubtful.

As the custom must have been established before the ancient period of legal memory, it cannot warrant conveyances deriving their effect from the Statute of Uses. But the infant may, it seems, declare the uses at common law, upon the feoffment (*s*).

Not by conveyance under Statute of Uses.

It is usual to add to the memorandum of livery of seisin, an attestation, that the consideration money was paid to the infant, instead of indorsing a receipt for it. It is questionable whether the custom warrants any alienation except on a sale for valuable consideration. And it seems, that the privilege of alienation is confined to infants taking by descent.

It must be on a sale,

and of lands descended,

The infant must be seised in fee, and cannot, by feoffment, discontinue lands entailed. It seems, that as he may make a feoffment in fee, so, his personal livery may create any less estate; as, for life, or in tail, or to one for life, with remainder to another in tail.

and in fee.

What estates may be created.

Lord Coke says, that an infant seised of socage land may, by custom, make a binding lease at the age of fifteen (*t*).

Infant may make lease at 15, by custom.

A custom has been alleged (*u*) in certain boroughs, that an infant might sell his land when he could count twelve pence, or measure certain yards of cloth. This was the test by which the continuance of the customary wardship as to burgage lands was determined (just as the majority of tenants in socage was fixed at the age when they were conceived to be fit for agricultural employments); but such pretensions have been disregarded by the courts, who have required to be certainly informed how old the infant was at the time of the alienation; and it seems, that alienation by an infant under years of discretion would not be supported.

Custom for infant to sell lands of burgage tenure, when he could count and measure;

how far supported.

An infant may, by special custom, surrender copyhold by

Infant may

(*s*) Gilbert on Uses, 250.

(*u*) Robinson on Gavelkind,

(*t*) Co. Litt. 45.

book 2, chap. 3.

surrender copyholds by special custom; otherwise his surrender is voidable.

way of alienation, or otherwise, and be bound by the surrender (*v*). But unless there be a special custom to authorize it, his surrender is not void, but voidable, and he may enter at full age. He may therefore (independently of stat. 1 Will. 4, c. 65 (*w*)) surrender copyhold land held for lives, for the purpose of effecting a renewal, subject to his right to avoid the transaction when of age; but it is desirable that it should appear on the face of the surrender, that such renewal is beneficial to the infant (*x*).

Lease for years of copyhold voidable as regards strangers, though amounting to a forfeiture.

A lease for years by an infant copyholder, with reservation of rent, even though there was reason to contend that it worked a forfeiture of the land to the lord, has been held to be, as between the lessor and the lessee, only voidable, and capable of confirmation at full age (*y*).

Before stat. 1 Vict. c. 26, an infant might, by custom, devise his lands at the age of fourteen, but any custom to devise under that age was bad (*z*).

Execution of power over copyhold.

In respect of the execution of powers by an infant, copyholds stand on the same footing with freeholds (*a*).

(*v*) By the custom of the manor of Panington, an infant of the age of twelve may surrender. *Lyde v. Sominster*, Toth. 173. A surrender by an infant of four or five years of age, by virtue of a custom, has been allowed. *Nayler v. Strode*, 2 Ch. Rep. 392. It has been asserted that there might be a custom for husband and infant wife to surrender the wife's land, she being privately examined. Litt. Rep. 274;

1 H. Bl. 345.

(*w*) See p. 315, *supra*, and sect. 1 of the statute.

(*x*) See 1 Scriv. Cop. 167; 1 Watk. Cop. 62; *Hughs v. Carpenter*, Toth. 278; Sir F. Mo. 596, 7; Poph. 39; Cro. Eliz. 90; 1 Leon. 95.

(*y*) *Ashfield v. Ashfield*, Sir W. Jo. 157.

(*z*) 2 And. 12; Perk. s. 504.

(*a*) See the next section.

SECTION XI.

Execution of Powers.

AN infant may at common law, generally speaking, do acts in which he is "a mere instrument or conduit-pipe," and in which his interest is not concerned (*b*). Upon this principle it seems that he may execute a power simply collateral (*c*); but that he cannot execute, over property of any kind, any power which is not simply collateral (*d*).

Infant may execute power simply collateral, but no other power ;

A male infant's marriage settlement, made by way of exercise of a power, was on one occasion supported. The case has been stated and observed upon as follows by Sir Edward Sugden (*e*).

It has been thought that an infant may execute even powers appendant and in gross (*g*). The case of *Hollingshead v. Hollingshead* (*h*) is, as reported, an authority that way. An infant, tenant for life, with a power of jointuring, upon his marriage covenanted to settle lands on his wife, and afterwards died without having made any jointure; and equity made good the jointure, which, as, the facts are stated, could only be on the principle that the infant had a disposing power. But Lord Alvanley, when Master of the Rolls, seemed to think that the infant had done some act after he came of age to confirm the jointure (*i*). And in a case at the Rolls in the year 1738, the Master of the Rolls said, that the case of *Hollingshead v. Hollingshead* was an idle case, and not law (*k*).

(*b*) Bridg. 107 ; 3 Atk. 710. C. C. 466; see *Lady Hooke v. Grove*,

(*c*) See 1 Sugden on Powers, 5 Vin. Abr. 293, pl. 40.

chap. 4, s. 2, 6th ed.

(*i*) See 4 Bro. C. C. 466.

(*d*) *Hearle v. Greenbank*, 3 Atk.

695 ; S. C. 1 Ves. 298.

(*k*) *Colton v. Hoskins*, Rolls, 21

March, 1738 ; 16 Vin. Abr. 486,

(*e*) 1 Sugden on Powers, 215.

pl. 3 ; and see *Lord Kilmurry v.*

(*g*) 1 Prest. Abs. 326.

Dr. Grey, cited, 2 P. W. 671, ex-

(*h*) 2 P. W. 229 ; 1 Stra. 604 ; plained in 3 Atk. 713.

Gilb. Eq. Rep. 168 : cited, 4 Bro.

not even if
given expressly
during infancy.

With reference to the opinion that an infant might exercise a power not simply collateral given by express words during infancy, Sir Edward Sugden has remarked, that it would be a bold decision, that an infant may have a power of disposition over an estate through the medium of the Statute of Uses. Before the statute, it is clear that an infant could not alien a use limited to him, that is, could not direct his trustees to convey the estate to a third person. In that respect equity followed the law. Now the statute only operates upon what were uses at the time it passed. A power not simply collateral is a beneficial right to direct the trustee to convey the estate to whom you shall appoint. This direction an infant cannot give by reason of his non-age. Therefore, the appointee never gains a use, or equitable right, upon which the statute can operate (*l*).

When he might
have exercised
power over
personalty.

All property
alike in this
respect.

A power appendant seems to be of the nature of property, and it was fair to hold that a man should not indirectly exercise proprietary rights before the age when he could make a valid direct disposition by will or deed. It was not inconsistent with this principle to allow an infant, old enough to make a will of personalty, to exercise a power of appointing personalty by will (*m*). But it seems that such appointment would now, under stat. 1 Vict. c. 26, be invalid, and that property of every kind is in this respect placed on the same footing.

(*l*) 1 Sugden on Powers, 216. *supra*; 1 Sugden on Powers, 220;

(*m*) *Hearle v. Greenbank*, *ubi* Sugden on Wills, p. 8.

CHAPTER XXXVI.

CIVIL LIABILITIES OF INFANTS IN RESPECT OF CONTRACTS
IN GENERAL AND OF TORTS.

A PERSON of full age who contracts with an infant is bound by the contract, unless fraud is practised upon him, and he is liable in damages for the non-performance of it (*a*). Person of full age bound by contract with infant.

The rule of the civil law is, that "in his causis, in quibus obligationes mutue nascuntur . . . si tutoris auctoritas non interveniat, ipsi quidem, qui cum his contrahunt, obligantur, at invicem pupilli non obligantur (*b*)."

The contract of an infant is considered in law as different from the contracts of all other persons.

His liability in respect of contracts for necessities and of contracts entered into on marriage will be separately considered (*c*). Laying these branches of the subject out of view, as well as the contract of marriage itself, which has been already treated of (*d*), the promise (*e*) of an infant is, generally speaking, absolutely void, as against himself; and on an action of *assumpsit* brought upon any promise made during infancy, the defendant might formerly have given his infancy in evidence under the general issue of *non assumpsit* (*g*), and he may now plead that he was an infant at the time of making the promise (*h*). The payment of money into Court will not pre- Promise of infant void.

(*a*) *Holt v. Ward*, Stra. 937; (*e*) See 1 Selw. N. P. 122, 304, *Supra*, 168; *Warwick v. Bruce*, 2 M. & S. 205; see the cases collected, Bac. Abr., tit. Infancy and Age, (I) 4. (*g*) *Stone v. Wythipoll*, Cro. Eliz. 126; *Darby v. Boucher*, 1 Salk. 279; see 2 H. Bl. 515.

(*b*) Just. Inst. Lib. I, tit. xxi. Exord. (*h*) Under the recent General Rules; see 1 Chitty on Pleading, 476, 515, 6th ed.

(*c*) See the two next Chapters.

(*d*) *Supra*, chap. 17.

Infancy may be pleaded to action of *assumpsit*.

Effect of pay-

ment of money
into Court.

clude a defendant from availing himself of his infancy, because the money may have been paid into Court for necessities (*i*), which form, to a certain extent, a legitimate subject of contract, even for an infant.

Infant not
bound by ac-
count stated.

An infant cannot bind himself by the recitals of a deed made during his infancy (*k*), nor by an account stated, even of monies due for necessities; because the law does not suppose him capable of accurate computation (*l*): and he cannot bind himself by a warrant of attorney or cognovit (*m*), or by any bill drawn, accepted, or indorsed in the course of trade (*n*), or by any negotiable bill, even for necessities (*o*); as his signature to a negotiable bill or note not only *prima facie* admits the debt, but, if valid, would render him liable to an action at the suit of the indorsee, in which the amount of the original debt could not be disputed.

Nor by any ne-
gotiable instru-
ment.

Bond with pe-
nalty void.

Such contracts of infants as the Court can pronounce to be to their prejudice are merely void (*p*). Of this class is a bond with a penalty, conditioned for the payment of interest; and it cannot be enforced unless the infant be estopped from disputing the claim by some act at full age of as high authority as the bond (*q*).

The infant
alone can plead
infancy.

The privilege of an infant is a personal privilege, of which he alone can take advantage, and contracts can be avoided for the infancy of the contractor, only by the contractor himself (*r*).

Liabilities on
bills of ex-
change.

The drawer, therefore, of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the

(*i*) *Per* Buller, J., in *Hitchcock v. Tyson*, 2 Esp. N. P. C.

481, n.

(*k*) 18 Ves. 274.

(*l*) *Trueman v. Hurst*, 1 T. R.

40; *Bartlett v. Emery*, *Ibid.* 42;

Ingladew v. Douglas, 2 Stark. N. P.

C. 36.

(*m*) *Oliver v. Woodruffe*, 7 Dowl.

166. See p. 362, *supra*.

(*n*) *Williams v. Harrison*,

Carth. 160.

(*o*) *Williamson v. Watts*, 1

Campb. 552. See the note, *Ibid.*

(*p*) 2 H. Bl. 515.

(*q*) *Fisher v. Mowbray*, 8 East,

330; *Baylis v. Dinely*, 3 M. & S.

477.

(*r*) See *Grey v. Cooper*, 3 Doug.

65; *Keane v. Boycott*, 2 H. Bl.

515; *Taylor v. Croker*, 4 Esp.

N. P. C. 187.

action of the indorsee (*s*); nor can the acceptor set up the infancy of the drawer as a defence to such an action (*t*).

On the question, whether the holder of the note of an infant had an insurable interest in his life, Mr. Justice Buller, on one occasion, at N. P., intimated an opinion in the affirmative; and observed, that the interest must be contingent, for the infant might or might not avoid his note; and he doubted much whether, till so avoided, the note must not be taken, against a third person, to be the note of an adult; for the maker of the note only could take the objection (*u*).

The holder of an infant's note has an insurable interest in his life, *semble*.

If a bill be accepted by a party after he is of full age, he will be liable, although he was an infant when the bill was drawn (*v*).

An infant is not liable, by the custom of the realm, for the loss of goods committed to his care as an innkeeper (*w*).

The act of binding himself apprentice, being an act manifestly for the benefit of an infant, is one which he is competent to perform (*x*).

Infants of either sex may be bound, by indenture executed by themselves (and not otherwise), as apprentices to any person (even, it seems, to an infant (*y*)) for any number of years; but the indentures are voidable by the infants at twenty-one (*z*), and will be held to be avoided by a proper and deliberate announcement to that effect (*a*).

Infants may bind themselves apprentices by indenture, voidable at 21.

No action lies, generally speaking (*b*), on an infant's cove-

No action lies

(*s*) *Grey v. Cooper*, 3 Doug. 65. & S. 257; 3 B. & C. 484.

(*t*) *Taylor v. Croker*, 4 Esp. N. P. C. 187; and see *Haly v.* 196.

(*u*) *Dwyer v. Edie*, Park, Insur. 639, 7th ed. (*z*) *Ex parte Davis*, 5 T. R. 715.

(*v*) *Stevens v. Jackson*, 4 Campb. 164. (*a*) See *Gray v. Cookson*, 16 East, 13.

(*w*) *Crosse v. Andross*, 1 Roll. Abr. 2; 2 Marsh. 486. (*b*) *Gylbert v. Fletcher*, Cro. Car. 179; see *Rex v. Arnesby*, 3 B. & Ald. 584; *Rex v. Arundel*, 5 M. & Sel. 257; *Rex v. Queenborough*, 2 B. & Ad. 219.

(*x*) See Burn's Justice, art. Apprentices; 1 Bott, 705, 717; 5 M.

on infant's covenant in the indentures.

nant to serve in his indentures of apprenticeship (c); nor can any of the stipulations which they contain be enforced against him in equity (d). It is said, however, that by the custom of London, an infant may bind himself in an indenture of apprenticeship, so as to be subject to an action against him, even in the courts at Westminster (e).

Friends usually bind themselves for him.

Some friend of the infant usually undertakes for his faithful discharge of his office, according to the terms agreed on (g); and the father or other person covenanting is bound for the performance of the covenants by the son, and must make compensation to the master, if the apprentice avoids the covenant at twenty-one (h).

Parish apprentices.

Poor children may be apprenticed out at the age of nine, by the parish overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting (i).

Chimney-sweepers' apprentices.

By a recent statute (k), it is enacted, that after the 7th of August, 1840, no child under the age of sixteen shall be apprenticed to a chimney-sweeper; that between the first of July, 1841, and the first of July, 1842, any apprentice to a chimney-sweeper may, on his own application, be discharged from his indentures: and that after the latter day, all existing indentures of apprenticeship to that business, of any child under the age of sixteen, shall be null and void; and any person compelling or allowing any young person under twenty-one

(c) If he misbehave himself, the master may correct him in his service, or complain to a justice of peace to have him punished, according to the statute.

(d) *Capes v. Hutton*, 2 Russ. 357.

(e) *Stanton's Case*, Sir F. Moore's Rep. 136; see *Eden's Case*, 2 M. & Sel. 226; and the judgment of Lord Eldon, C. J., in *Beard v. Webb*, 2 Bos. & Pull. 93.

(g) 4 Bac. Abr. 562, tit. Mas-

ter and Servant.

(h) *Branch v. Evington*, 2 Doug. 518; *Cumby v. Hill*, 3 B. & A. 59.

(i) 1 Bl. Comm. 426; Burn's Justice, art. Apprentices.

(k) 3 & 4 Vict. c. 85. The labour of children in factories is regulated by stat. 3 & 4 Will. 4, c. 103, and stat. 4 & 5 Will. 4, c. 1. The employment of children in mines is regulated by stat. 5 & 6 Vict., sess. 2, c. .

to ascend or descend a chimney, or enter a flue, in the exercise of the business, shall be liable to a penalty.

The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as, to an action for slander (*l*), an action of trover for property embezzled, or an action grounded on fraud committed (*m*). So, an action of detinue is maintainable against an infant, if he refuses to re-deliver goods which were delivered to him in ignorance of his minority, for a special purpose; for a bailment of goods to be re-delivered imports an agreement to re-deliver them; but for want of a capacity in the infant to make a complete contract, no bailment is, in fact, made in such a transaction; and the goods must be in the same situation as if the infant had wrongfully got possession of them without pretence of bailment (*n*).

Infants liable to actions in tort;

Where an infant copyholder in fee made a lease for years, rendering rent, and at full age received his rent, and afterwards entered on the lessee; it was held, that the lessee might maintain an action of trespass against him (*o*).

The plaintiff will not be permitted to vary the liability of the infant to the prejudice of the latter, by varying the form of his action; and if the transaction between the parties was really a contract, the plaintiff cannot proceed upon it as for a tort. Thus it is said, that if a man deliver goods to an infant on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion (*p*).

but cannot be proceeded against in tort for a contract;

But it is otherwise where there has been wilful misconduct and breach of trust on the part of the infant, and where he fills a situation of confidence.

An infant, master of a ship, entered into a contract to carry

Infant master of ship liable.

(*l*) 8 T. R. 335; *Defries v. Davis*, 3 Dowl. 629; S. C. 1 Scott, 594; 140.

(*n*) *Mills v. Graham*, 1 N. R.

S. C. 1 Bing. N. C. 692.

(*o*) *Ashfeld v. Ashfeld*, Sir W.

(*m*) *Per* Lord Kenyon, in *Bris-* Jo. 157.

tow v. Eastman, 1 Esp. N. P. C. 172; and see 2 Ed. 72.

(*p*) 1 Sid. 129.

certain goods to England, and did not deliver them according to the agreement, but wasted and consumed them. It was held, that he might be sued for the goods in the Admiralty Court, since the suit was in the nature of detinue, or trover and conversion, at common law; and a prohibition to the Admiralty Court was refused (*q*).

Where infancy may be pleaded to declaration in tort.

If an infant hires a horse to go a journey, in the course of which the horse is strained, infancy is a good plea to a declaration for this injury in tort (*r*).

Infancy is a good defence to an action of *assumpsit* on the warranty of a horse (*s*): for the warranty is, in fact, an *undertaking* that the horse is sound, and the plaintiff does not make his case stronger by declaring in tort, and alleging deceit practised in the course of the contract (*t*).

It has been held, that an action does not lie against an infant for obtaining a loan by representing himself to be of full age; because the affirmation being by an infant, was void (*u*).

Infant cannot escape from liabilities for a tort, because sued as on contract.

If on the other hand, an infant has committed a tort, he will not be allowed to escape from his liability because the plaintiff proceeds upon it as upon a contract. Thus, an action on *assumpsit* for money had and received will lie against an infant, to recover money which he has embezzled; for though the action is in its form an action *ex contractu*, yet it is in substance an action *ex delicto*, and the same rule of law applies (*x*).

Infancy pleaded to action on joint contract; a new action was requisite;—

Formerly it was held, that where the plaintiff declared on a joint contract, and one of the defendants pleaded infancy, the plaintiff could not enter a *noli prosequi* as to him, and pro-

(*q*) *Furnes v. Smith*, 1 Roll. Abr. 530. It is not stated whether the fact of the infancy (an unusual circumstance in masters of ships) was known to the other party.

(*r*) *Jennings v. Rundall*, 8 T. R. 335.

(*s*) *Howlett v. Haswell*, 4 Campb. 118.

(*t*) *Green v. Greenbank*, 2 Marshall, 485.

(*u*) *Johnson v. Pie*, 1 Keb. 905, 913; S. C. 1 Lev. 169.

(*x*) *Bristow v. Eastman*, 1 Esp. N. P. C. 172.

ceed against the other defendant, but should discontinue that action, and commence a new action against the adult defendant only (*y*).

In a subsequent case (*z*), where the plaintiff declared against one defendant on a bill of exchange accepted by him and another, to which the defendant pleaded the non-joinder, and the plaintiff took issue on the plea, it was held that he could not recover, because the bill itself proved the averment that the defendant made the promise jointly with the other. And the Court observed, that the plaintiff should have replied the infancy. Another action was afterwards brought against the same defendant, who pleaded in like manner the non-joinder; the plaintiff then replied the infancy, and recovered on demurrer to the replication (*a*).

It has been observed (*b*), that the late pleading rules appear to have altered the law of the cases of *Chandler v. Parkes*, and *Jaffray v. Frebain*. The plea of *non assumpsit*, at the time when they were decided, put in issue both the making of the promise in fact, and its validity in point of law. The alleged promise in the declaration was therefore interpreted to mean a promise binding in law; and any defence which negatived such a promise by the two disproved the allegation. Hence infancy became admissible under the general issue; the effect was the same as if the plaintiff had joined an utter stranger. But as *non assumpsit* now puts in issue only the promise in fact, or what is equivalent for this purpose, the facts from which *primâ facie* a promise is implied, the promise alleged means nothing more. Infancy, therefore, is directed to be specially pleaded; and, as the contract alleged will be proved, if there is a plea of *non assumpsit*, or admitted, if there is not, the ground of objection is altogether removed.

but no longer
is so.

(*y*) *Chandler v. Parkes*, 3 Esp. N. P. C. 76; *Jaffray v. Frebain*, 5 Esp. N. P. C. 47. (*a*) *Burgess v. Merrill*, 4 Taunt. 468. (*b*) Lush's Practice, 78.
(*z*) *Gibbs v. Merrill*, 3 Taunt. 307.

In the year book, 32 Hen. 6, pl. 6, it is said, "where an infant and a man of full age were bound, or a feme covert, there the action shall be against both, and they shall have advantage by way of plea of the non-age or coverture." Thus infancy was no defence on the plea of *non est factum*, for it was still the bond of the plaintiff in point of form, though not in validity.

It is optional to join infant or not in action on joint contract.

It follows, that an infant may now, in all cases, be joined without risk to the action; and if the disability be pleaded, the plaintiff may enter a *nolle pros.* as to that party, notwithstanding that he also pleads in denial of the contract (c). Still the infancy may be replied as before in a plea of abatement, so that it is not necessary to make the infant a party.

Contract for sale or purchase cannot be enforced by infant.

If an infant enter into a contract for the sale or purchase of an estate, or for any other purpose, he cannot enforce it in equity, nor can it be enforced against him, for it is not mutual (d).

Infant cannot recover deposit.

But although an infant cannot be compelled to complete a contract for the purchase of a property; yet if he contract for an estate and pay a deposit, he cannot in the absence of fraud recover it back, because he declines to complete the purchase. But if he could shew that fraud had been practised upon him, it would be otherwise.

Contracts with infant for purchase of annuity are void.

The purchase of annuities from infants is forbidden by a statute (e), which enacts "That all contracts for the purchase of any annuity or rent-charge with any person being under the age of twenty-one years shall be and remain utterly void, any attempt to confirm the same after such person shall have attained the age of twenty-one years notwithstanding: and that if any person shall, either in person, by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person being under the age of twenty-one years, to grant or at-

Persons attempting to procure annuity from infant are guilty of misdemeanor.

(c) 3 Taunt. 307.

Flight v. Bolland, 4 Russ. 298.

(d) 1 Sugd. V. & P. 335, 10th

(e) 53 Geo. 3, c. 141, s. 8.

ed.; *Capes v. Hutton*, 2 Russ. 357;

tempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance or procure or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent-charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years, or shall induce or solicit or procure any infant upon any treaty or transaction for money advanced or to be advanced to make oath or to give his or her word of honour or solemn promise that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such annuity or rent-charge; every such person shall be guilty of a misdemeanor, and punishable accordingly with fine, imprisonment, or other corporal punishment."

In the construction of deeds, the rule is, that where the indenture is by any matter of law void as against one party, it is not necessarily void against others to whom the particular disability does not apply (*g*).

If a joint and several annuity be granted by two persons, one of whom is an infant, it is void as to the infant at common law, and by statute (*h*) incapable of being confirmed by him at full age, but the adult remains bound by his several covenants (*i*).

Joint and several grant by infant and adult; good against adult.

It seems doubtful whether if the covenant be joint only, and not joint and several, it would be good as against the adult (*k*).

Where joint only, *query*.

If goods which are not necessities are delivered to an infant, who after full age ratifies the contract by a promise to

Infant's contract ratified at full age.

(*g*) See 1 Scott, 589.

(*k*) *Motteux v. St. Aubin*, 2 Sir

(*h*) 53 Geo. 3, c. 141, s. 8.

W. Bl. 1133; *Ashlin v. Langton*,

(*i*) *Haw v. Ogle*, 4 Taunt. 10; 4 M. & Scott, 719.

Gillow v. Lillie, 1 Scott, 597.

The promise
must be volun-
tary,
and in writing.

pay, he is bound (*l*). But the promise must be voluntary, and not extorted from the party in ignorance of his privilege, nor under the terror of an arrest (*m*). It must likewise be in writing, for it is enacted by a recent statute (*n*), "that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

What particu-
lars may be dis-
penssed with.

A written promise to pay a debt contracted during infancy, is sufficient under the statute, although it neither contains the name of the creditor, the amount due, nor the date; and parol evidence is admissible to supply these particulars (*o*).

Effect of bond
given during
minority for
simple contract
debt.

But if a bond be given by an infant during his minority for the amount of a simple contract debt, not for necessaries, the giving of the specialty will so extinguish the simple contract debt as not to leave a sufficient consideration for an express promise after full age to operate upon, and consequently *assumpsit* on the original cause of action cannot be maintained (*p*).

Defendant
must prove his
infancy.

On a replication to this effect, viz. that the defendant, after he came of age, confirmed the promise, if the defendant rejoins that he did not, after he came of age, confirm the promise, it is sufficient for the plaintiff to prove the original promise, and the defendant must prove infancy if he means to take advantage of it, because it will be presumed that a person who contracts is of a proper age to contract, until the contrary be shown (*q*).

(*l*) *Southerton v. Whitlock*, Stra. 798; Bull, N. P. 155; see *Cockshott v. Bennett*, 2 T. R., 766; 1 Selw.

(*m*) *Harmer v. Killing*, 5 Esp. N. P. 124, n., 10th ed.; *Contra*, Bac. Abr., tit. Infancy, (1).

(*n*) 9 Geo. 4, c. 14, s. 5.

(*o*) *Hartley v. Wharton*, 3 Perr. T. R. 649.; recognised in *Hartley v. Wharton*, 3 P. & D. 529.

(*p*) *Tapper v. Davenport*, 3 Keb.

A promise made after the commencement of an action is not sufficient to sustain a replication, that the defendant (who had pleaded infancy) ratified the contract after he came of age (*r*). Sufficiency of ratification.

Where A., on coming of age, writes a letter desiring another person to pay a bill accepted by A. during his minority; in an action against A. on the bill, the declaration need not contain any special count founded on the promise to pay, made after coming of age (*s*).

It has been already shewn that all deeds which are merely voidable may be confirmed at full age; and in the same way all contracts may be confirmed or adopted at full age. Adoption of contract at full age.

An infant (*t*) by himself and guardian entered into articles with J. S. to let him a farm at a certain rent. J. S. entered upon the farm, and continued the possession, and paid rent after the infant came of age. The late infant afterwards conveyed the inheritance to a purchaser, and then J. S. quitted the farm, insisting that he was only tenant at will, and refused to accept a lease, or execute a counterpart, because the other party, being an infant at the time of making the agreement, was not bound by it, and therefore J. S. ought not to be bound by it. It was said on the other side, that an adult party is bound by an agreement with an infant.

Lord Harcourt, C., upon a bill by the purchaser against J. S. for specific performance, decreed, that the plaintiff should execute a lease to the defendant, and the defendant execute a counterpart of such lease to the plaintiff in pursuance of the articles; and the defendant was ordered to pay the costs.

Here, independently of the argument that the adult was bound by the original agreement, the payment of rent to the infant after he came of age, and its acceptance by the latter, amounted to an adoption of the articles.

- (*r*) *Thornton v. Illingworth*, 2 B. 109.
 & C. 824. (*t*) *Clayton v. Ashdown*, 9 Vin.
 (*s*) *Hunt v. Massey*, 3 N. & M. Abr. 393, pl. 4.

Infant cannot trade.

An infant cannot trade, because he cannot be made liable on contracts entered into by him in the course of trade (u).

Contract to enter into trade voidable at full age. Deposit for trading purposes recoverable;

As an infant cannot trade, a contract to enter into trade is one which he may avoid when he comes of age; and where it is part of the contract that a sum of money shall be paid in advance, as a deposit, and the sum has actually been paid, he may recover it (x); otherwise the protection which the law extends to an infant might be altogether eluded by allowing the other party to retain money so paid in advance. Besides, the principle which exempts an infant from any forfeiture or penalty annexed to a contract, (even for necessities (y)), extends as well to a penalty enforced by requiring money to be handed over in advance, as to penalties accruing on the breach of a condition.

but not if infant has derived any advantage.

But it is otherwise if an infant has derived any advantage under a contract. An infant entered into partnership with another person (z), and paid a sum of money as his share of the consideration for a lease, for the purpose of carrying on the partnership business, and the parties occupied the premises accordingly for some months, when the infant coming of age dissolved the partnership, relinquished the business, and sought to recover the money he had paid the lessor for his lease. It was considered that the infant having paid money on a valuable consideration, and having partly enjoyed the consideration, could not put the defendant in the same position as before; and he was not allowed to recover. So, if an infant should pay for expensive clothes or other articles not necessary, and after wearing them, bring an action for the price; in such an action he could not (a) recover, although the tradesman, if unpaid, could not have enforced payment (b).

(u) 1 Roll. Abr. 729; Dyer, 104 b, in margin; 1 Mod. 137; Stra. 1083; 2 B. & C. 824.

(x) *Corpe v. Overton*, 10 Bing. Ca. 197.

252; S. C. 3 M. & Scott, 738.

(y) Co. Litt. 172. a.

(z) *Holmes v. Blogg*, 8 Taunt. 506.

(a) 10 Bing. 259; Peake, Add.

Ca. 197.

(b) In the case of *Wilson v.*

An infant may by law be a partner with other persons, and be entitled to all the benefits resulting from the partnership, though he is not responsible for the debts contracted during his infancy. If there is a partnership subsisting when he comes of age, the partnership is taken to continue till something is done to dissolve it; and if the late infant gives no notice of dissolution, he is responsible for all the debts contracted by the firm after he came of age (c).

Infant may be a partner for beneficial purposes only.

Becomes responsible if he continues after age.

It seems that an infant partner must join (by guardian or *prochein amy*) in an action by the firm for recovery of a debt due to the firm. The defendant will thus be enabled to set off against a debt from himself to the firm, any debt from the firm to himself, contracted by the infant in the name of the partnership (d): for, if persons of full age choose to make an infant their partner, and to give him the credit and authority which belongs to that situation, it is reasonable that they should be liable for debts so contracted by him: and this is perfectly consistent with the observation of Bayley, J., in *Thornton v. Illingworth* (e), that "in the case of an infant a contract made for goods for the purpose of trade is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts;"

Infant partner must join in actions by the firm. He may contract debts in the name of the firm.

Kearse, at N.P., Peake, Add. Ca. 196, which does not appear to have been brought before the Court in *Corpe v. Overton*, the plaintiff, being an infant, contracted with the defendant to purchase the goodwill and stock of a public-house, and made a deposit. Being afterwards called upon to complete his contract, he refused, and brought an action to recover his deposit. Lord Kenyon is stated to have been of opinion, that though an infant was not compellable to complete a contract, yet, when he had paid money un-

der it, he could not recover it back, unless he could shew that fraud had been practised on him. This case, (unless there had been some enjoyment under the contract), must be considered as overruled by *Corpe v. Overton*, in which the Court laid down the law quite independently of fraud.

(c) *Goode v. Harrison*, 5 B. & Ald. 147; see *Glossop v. Coleman*, 1 Stark. N. P. C. 25.

(d) *Teed v. Elworthy*, 14 East, 210.

(e) 2 B. & C. 826.

and with what was laid down in *Goode v. Harrison* by Best, J., who, speaking of a contract of partnership by an infant, says that "it is not void, for, if void, the infant himself could take no advantage of it. It has however been decided that an infant may be a partner, and may take advantage of a partnership contract;" although, (as stated by Holroyd, J., on the same occasion), "he will not be liable for the losses, if he chooses to take advantage of his infancy."

Infant not within the Bankrupt Act.

The bankrupt law applies only to traders; a trading by the party at the time the act is committed, is one of the conditions upon which such act receives its character as an act of bankruptcy, and it is only against a trader that the Lord Chancellor has jurisdiction to issue the commission. An infant, therefore, cannot be a bankrupt (*g*); and if a commission of bankrupt issues against him, it will, under ordinary circumstances, be superseded by the Lord Chancellor or the Court of Bankruptcy, and at the expense of the creditor on whose petition it was sued out (*h*).

Commission will be superseded.

Secus, if he has held himself out as adult.

But where a commission (*i*) issued against an infant, who had held himself out to the world as an adult and *sui juris*, Lord Eldon refused to supersede it on the petition of the bankrupt, and left him to his remedy at law (*k*).

Commission void at law.

At law, a commission of bankrupt against an infant is held to be absolutely void, whether it has been superseded or not (*l*); nor can a man be made a bankrupt by a commission issued after he attains twenty-one, for a debt contracted in his infancy (*m*); but if his conduct after he attained his full age has been such as to confirm the debt of the petitioning creditor, and the several contracts which he made in his trade,

Commission may be supported by trading after full age.

(*g*) 1 V. & B. 494.

supra, p. 434.

(*h*) *Ex parte Sydebotham*, 1 Atk. 146; *Ex parte Hekir*, 3 Dea. & Ch. 107.

(*l*) *O'Brien v. Currie*, 3 C. & P. 283; *Belton v. Hodges*, 9 Bing. 365; S. C. 2 M. & Scott, 496.

(*i*) *Ex parte Watson*, 16 Ves. 265.

(*m*) *Rex v. Cole*, 1 Lord Raym.

(*k*) See *Magauran v. Jamieson*, 443.

this may perhaps enable him to be considered such a trader as might commit an act of bankruptcy (*n*).

Thus, where a bankrupt who had been in possession of his certificate for a considerable time, applied to the Lord Chancellor to supersede the commission, and it appeared that the only trading which had been deposed to was during infancy; Lord Eldon refused to supersede the commission, and observed that there was enough to have authorized the petitioning creditor to claim the right to try the fact of trading, after the bankrupt became adult, which would support the commission (*o*).

An infant cannot be the petitioning creditor in bankruptcy, for he cannot give a bond, which the petitioning creditor must do; and the infancy of the petitioning creditor affords ground for superseding a commission (*p*).

Infant cannot be petitioning creditor.

It is doubtful (*q*) whether an infant can take the benefit of the Act for the Relief of Insolvent Debtors, 1 & 2 Vict. c. 110, which by sect. 37, requires the insolvent, before his discharge, to execute a warrant of attorney for entering up judgment against him for the amount of his debts.

Discussion as to how far infant can take benefit of Insolvent Act.

In order to examine the merits of this question, it is necessary, in the first instance, to refer to the enactments of previous statutes for the relief of insolvents.

By stat. 54 Geo. 3, c. 23 (amending stat. 53 Geo. 3, c. 102), insolvents were required to enter into a recognisance to the King for the amount of their debts. An infant's recognisance is not void, though voidable during minority (*r*); and it is understood, that, under this act, infants were allowed to give recognisance, and to be discharged.

Stat. 54 Geo. 3, c. 23, recognisance to King.

Infants discharged.

(*n*) 9 Bing. 369.

(*o*) *Ex parte Moule*, 14 Ves. 602.

(*p*) *Ex parte Barrow*, 3 Ves. 544.

(*q*) See Cooke on Insolvents, chap. 10, 2nd ed. The report of *Burton v. Haworth*, 5 Madd. 50, must be erroneous in ascribing to

Sir John Leach the general proposition, that an infant could not be an insolvent debtor within 49 Geo. 3, c. 115, "because he could not legally be in custody for debt." See *supra*, p. 361; and the next chapter.

(*r*) *Supra*, p. 464.

Stat. 1 Geo. 4, c. 119, assignment, and warrant of attorney.

By stat. 1 Geo. 4, c. 119, s. 25, insolvents were required to make an assignment of their property, and also to execute a warrant of attorney for entering up judgment, and such judgment was to have the force of a recognisance.

Married woman could not be discharged.

The commissioners of insolvents sitting under this act refused to discharge a married woman, on the ground that she could not execute a power of attorney, as required by the 25th section.

Dictum as to deeds of infants.

A mandamus was moved for in the Court of King's Bench (*s*), and it was urged at the bar, that minors were daily discharged, although they cannot make any assignment of their property, or execute a warrant of attorney. The Court refused to interfere, and intimated an opinion that the commissioners were right in deciding, that "a married woman who has no property to assign, who cannot execute a warrant of attorney, and comply with the other conditions, is not entitled to her discharge." It was also observed, that "the acts of a minor are not necessarily void, but voidable only; and a minor may execute a deed for his own benefit." This observation gives countenance to the opinion, that an infant might execute both an assignment and a warrant of attorney under the act.

Stat. 3 Geo. 4, c. 123, married women brought within the act by special provisions.

By stat. 3 Geo. 4, c. 123, s. 12, married women are required and empowered to execute a conveyance and assignment of their separate property, and also a warrant of attorney; and similar provisions are contained in 7 Geo. 4, c. 57.

Court refused to discharge infant.

In a case under stat. 7 Geo. 4, c. 57, the law as to infants not having been altered since the case of *Ex parte Deacon* occurred, the Insolvent Debtors' Court refused to discharge an infant, on the ground, according to one report (*t*), that being an infant he could not assign, as required by the 7 Geo. 4, c. 57, s. 11; or, according to another report (*u*), because, being

(*s*) *Ex parte Deacon*, 5 B. & P. C. 629.

Ald. 759.

(*u*) S. C. 1 Bingham, N. C. 692.

(*t*) *Defries v. Davies*, 3 Dowl.

an infant, he could not execute the warrant of attorney. He had been taken in execution for damages recovered in an action of slander; and the 49th section of the act gave especial jurisdiction in the case of persons who had been defendants in actions of this class. His discharge was opposed by the plaintiff.

It was stated in 1839, by a competent authority (*x*), that, since 1829, infants had not been discharged by the Insolvent Court.

Court not in the habit of discharging infants.

By stat. 1 & 2 Vict. c. 110, s. 36, the Court may, on the application of a detaining creditor of a prisoner in execution, make an order, vesting all his property, present and future, in the provisional assignee, without any assignment; and may deal with the prisoner according to the provisions of the act; but he must still, as has been already stated, execute a warrant of attorney.

Stat. 1 & 2 Vict. c. 110, order for vesting property of insolvent; power of attorney.

It is certain that no validity belongs to a warrant of attorney to enter up judgment in any other case (*y*).

It is true that the acts provide that the judgment shall have the force of a recognisance; but this judgment is not the act of the insolvent (*z*).

It should seem, therefore, that an infant cannot be discharged under the act on his own petition.

Infant cannot be discharged on his own petition, *semble*.

But if a detaining creditor should obtain a vesting order, and thus irrevocably secure the whole present and future property of the insolvent, there seems to be no reason why the infant should not execute the warrant of attorney, (whatever it may be worth), and obtain his discharge.

May be discharged after creditor has obtained vesting order, *semble*.

It is enacted by the Friendly Society Act, 10 Geo. 4, c. 56, s. 32, that a minor may become a member of any such society; and may execute all instruments, give all necessary acquittances, and enjoy all the privileges, and be liable to all the

Infant may bind himself as member of a Friendly Society.

(*x*) Cooke on Insolvents, 255.

(*z*) See Cooke on Insolvents,

(*y*) *Supra*, p. 361.

265.

responsibilities appertaining to members of matured age, notwithstanding his or her incapacity or disability in law to act for himself or herself: provided always, that such minor be admitted into such society by and with the consent of his or her parents, masters, or guardians.

He must not retain benefits derived from fraud of others.

An infant is not, any more than an adult, allowed to retain benefits which he has derived, however innocently, from the fraud, imposition, or undue influence of others (a).

Trustees selling for infants must make compensation where property falls short of representation.

Trustees selling property for infants are within the general rule of specific performance, that, where a misrepresentation is made as to the quantity, though innocently, the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the real quantity falls short of the representation (b).

Purchaser for infants is subject to the common rules as to notice.

Where a purchaser is, according to the rules of equity, affected with notice of an incumbrance, the circumstance of an infant's being interested in the purchase makes no difference (c).

Infant must not take advantage of his own fraud.

It seems scarcely necessary to add, that in the case of fraud of which an infant is conusant, infancy affords no excuse (d).

An example of this has already appeared in the treatment of infants trading under pretence of being of full age.

If a person having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert, or under age (e).

A tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the mortgage deed; and the Court relieved on the ground of the fraud in the infant, by not giving notice to the mortgagee of his title.

(a) See 14 Ves. 288.

(d) See 1 Bro. C. C. 358.

(b) *Hill v. Buckley*, 17 Ves. 394.

(e) 3 Sugd. V. & P. 428, 10th

(c) *Toulmin v. Steere*, 3 Mer. edition.

210; L. & G. Ca. t. Sugd. 251.

This was a very strong case ; for the young man did not know, but had only heard of the settlement under which his title arose ; but Lord Cowper said, " If an infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it(*g*)."

In another case, an infant, clerk to an attorney, had a mortgage on his master's estate, and ingrossed a subsequent mortgage of the same to another, without giving notice that the estate was mortgaged before to him ; and for that reason, on the ground of fraud, his mortgage was postponed(*h*).

Where a man was induced by the consent and approbation of an infant of nineteen to pay a large fine to his guardian for a lease of the infant's land, to commence six months after the determination of the infancy ; and the infant attested the execution of the deed and the payment of the money, Lord King, C., remarked that " infants are not privileged to cheat men," and declared the transaction to be binding(*i*).

A married infant, who was nearly of full age, concealing his infancy, persuaded certain persons to sell out part of a sum of stock which they held in trust for him, and to pay the proceeds to him ; after coming of age, he received a transfer of the residue of the trust fund : it was held by Sir T. Plumer, (independently of the recognition of the transaction by taking a transfer of the residue of the fund), that the infant's fraudulent concealment of his age, disabled him from compelling the trustees to make good the amount of stock sold during his infancy(*k*).

Where an infant, by giving a bond, had got into his possession two promissory notes made by his wife before marriage, and afterwards on the bond being put in suit, pleaded, that he

(*g*) *Watts v. Cresswell*, 9 Vin. 9 Mod. 35.

Abr. 415 ; S. C. 2 Eq. Ca. Abr. 515. (*i*) *Evroy v. Nicholas*, 2 Eq.

(*h*) *Clare v. Bedford*, 13 Vin. Ca. Ab. 488.

Abr. 536, 7 ; see *Savage v. Foster*, (*k*) *Cory v. Gertcken*, 2 Madd. 40.

was under age when he executed it; a bill was filed for relief, and the Court ordered the notes to be returned to the plaintiff, and directed the defendant not to plead, in answer to any action to be brought by the plaintiff on the notes, the Statute of Limitations, or any other plea which he could not have pleaded at the time when the bond was given (*l*).

Where infant is not chargeable.

It seems, however, that infants are not chargeable in all cases for wrongs done by them: thus, an infant executor (while infants could be executors) could not commit a *devastavit* (*m*); and in a modern case where letters of administration were granted to an infant, under which she received and disposed of the assets of the intestate, it was held that an account could not be directed of her receipts during her infancy (*n*).

If through negligence of adult, infant does injury, the former is liable; and also the latter, *semble*.

If through the negligence of an adult, it happens that an injury is done, without malice, by an infant, the adult (and perhaps also the infant) is civilly liable to the person injured.

Thus where a man sent for a loaded gun, desiring that the person who was to deliver it should take out the priming, which he did; the gun, after being delivered, went off by the imprudent act of the child, and wounded a bystander; the man who sent for the gun was held liable (*o*).

If through negligence of adult, infant sustains injury, the adult is liable.

And if, through the negligence of an adult, it happens that an infant, without shewing more indiscretion than is natural at his years, does himself some injury, the adult is liable to the infant in damages.

A man carelessly left his horse and cart unattended in the street; a child seven years old got upon the cart in play, another child incautiously led the horse on, and the child in the cart was thereby thrown down and hurt.

(*l*) *Clarke v. Copley*, 2 Cox, 173. Russ. 324; see *Smally v. Smally*, 1

(*m*) *Whitmore v. Weld*, 1 Vern. Eq. Ca. Abr. 6.

328; see *Russell's case*, 5 Rep. 27 a. (*o*) *Dixon v. Bell*, 5 M. & S.

(*n*) *Hindmarsh v. Southgate*, 3 198; see 1 Ad. & Ell. N. S. 35.

It was held that the master of the carman was liable in an action on the case by the child who had been hurt, though the plaintiff was a trespasser and contributed to the mischief by his own act; and that it was properly left to the jury, whether the carman's conduct was negligent and the negligence caused the injury (*p*).

(*p*) *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29.

CHAPTER XXXVII.

CONTRACTS FOR NECESSARIES.

SECTION I.

Liability of Infants in respect of Contracts for Necessaries.

Infant may
bind himself
for necessaries.

IT is laid down by Lord Coke (a), that "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards(b): but if he bind himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation shall not bind him."

In Cro. Eliz. 920, the Court held that an obligation from an infant for his necessary meat and drink, in the very sum disbursed on that account, was good, but not in double the sum, and in *Russell v. Lee* (c), judgment was given for the plaintiff in debt on a single bill by an infant for necessaries. A single bill was not negotiable, and the consideration was expressed in it(d).

(a) Co. Litt. 172. a.

Peale, Ibid. 386; 10 Mod. 67.

(b) See *North v. Thompson*, Coke's Entries, 125; case of *Clare and Darrell* or *Delavell*, cited 1 Sid. 112; Bro. Abr. 729; *Pickering v. Gunning*, Bro. Abr. 729; see Marsh's Rep. 40; *Duncombe v. Turkridge*, 9 Vin. 392; *Darby v. Boucher*, 1 Salk. 279; *Earle v.*

(c) 1 Lev. 86.

(d) In a note to the case of *Williamson v. Watts*, 1 Campb. 552, the learned reporter observes, that the old doctrine that a single bill given by an infant for necessaries is binding, though of no immediate practical use, such an instrument

The form in which men are sued in modern times for articles supplied during infancy, is by action of *assumpsit*.

Action of *assumpsit* for necessities.

When infancy is pleaded in answer to any demand, the plaintiff may reply, that the articles of which he seeks to recover the value were necessities for the infant. He must prove (*e*) that they were necessities, both in quality and in quantity (*g*), with reference to the real, and not merely to the ostensible means and wants of the defendant (*h*).

How the question of necessities should be raised in pleading.

The question, then, comes to be, what are necessities? Lord Coke's definition of the things for which an infant may bind himself has been already given (*i*).

The rule was stated more narrowly by Lord Hardwicke, who said (*k*) that the law lays infants under a disability of contracting debts, except for bare necessities; and that even this exemption is merely to prevent them from starving.

The cases, however, both previous and subsequent to this dictum (*l*), have settled the law upon a more liberal basis than that laid down by Lord Hardwicke; *necessaries* is considered to be a relative term, and those things are held to be necessary which are bought for real use, provided they are suitable to the infant's age, state, and degree (*m*). The necessity must of course be estimated according to circumstances; several cases have been reported on the subject.

Definition of necessities.

In a case in the reign of Queen Elizabeth (*n*), an action of debt was brought upon divers contracts, all for apparel; some for fustian suits; some for velvet and satin suits, laced with

What are necessities in quality.

being now as rare as a statute staple, seems to afford an argument from analogy to shew that a promissory note given by an infant for necessities would be binding, if payable only to the person who supplied them.

(*e*) *Ive v. Chester*, Cro. Jac. 560.

(*g*) *Burghart v. Angerstein*, 6 C. & P. 690.

(*h*) *Ford v. Fothergill*, 1 Esp. N. P. C. 211; Peake, N. P. C. 229.

(*i*) *Supra*, p. 498.

(*k*) *Brooke v. Gally*, 2 Atk. 35.

(*l*) See 6 M. & W. 46.

(*m*) *Hands v. Slaney*, 8 T. R. 578; *Peters v. Fleming*, 6 M. & W. 42.

(*n*) *Mackerell v. Bachelor*, Goldsborough, 168; Cro. Eliz. 583.

gold, amounting to £44; whereof the plaintiff was satisfied £4. The defendant pleaded infancy; the plaintiff replied, that the defendant was one of the gentlemen of the chamber to the Earl of Essex; and so it was for his necessary apparel. On demurrer the Court caused the declaration to be read, and finding that the defendant was there written "gentleman," agreed clearly, that the satin, lace, and velvet were not necessary apparel for a gentleman; and, therefore, the action would not lie for so much, but only for the residue. As, however, the plaintiff had acknowledged satisfaction for part of his contract, it was said that the payment so made should be intended to have been for the necessary apparel, and therefore he could not have judgment for any part.

In modern times, an infant, a captain in the army, was held (o) to be liable to pay for a livery ordered for his servant, but not for cockades which he had ordered for some of the soldiers of his company.

Where an action was brought (p) for the value of regimentals furnished to a member of a volunteer corps, Lord Ellenborough, C. J., said, that in those perilous times, when young men had inrolled themselves in different corps for the defence of the country, he should hold that clothes so furnished were necessities. It has been held (q), that a chronometer was not necessary for a lieutenant in the Navy, who was under twenty-one, and out of employment at the time when it was furnished; and (r) that a racing jacket, and a waistcoat at the price of eleven guineas, cannot be necessities for any one.

Where an infant (s), being a resident under-graduate in the University of Cambridge, and the eldest son of a gentleman of fortune, had been supplied with jewellery to the

(o) *Hands v. Slaney*, 8 T. R. Reports, 77.

578.

(r) *Burghart v. Angerstein*, 6

(p) *Coates v. Wilson*, 5 Esp. C. & P. 698.

152; Trin. T., 44 Geo. 3.

(s) *Peters v. Fleming*, 6 M. &

(q) *Ecrolles v. Ramsay*, Holt's W. 42.

amount of 8*l.* 0*s.* 6*d.*; the items consisting of several rings along with a short gold watch-chain and a pair of breast-pins; it was held that the rings, being merely ornamental, could not be necessary, but that the other articles were capable of actual use, and might be necessaries.

The hire and repair of a stanhope(*t*) were held not to be necessaries, in a case where it appeared that the defendant had held a commission in the army, but had sold out in consequence of not being able to maintain himself suitably; that he was the youngest of eight children of a clergyman in good circumstances, who had supported him during his infancy, and had given him the sum of £1500 on his coming of age(*u*).

The law does not allow infants to trade, either in the way of mere buying and selling, or by the exercise of handicraft (as of a painter and glazier, or a barber) on their own account(*x*). If an infant does engage in trade, wares furnished to him to be sold again, or work done for him in the way of his trade, cannot be recovered for as necessaries, although the infant may gain his living by the business(*y*).

Expenses incurred in trade, are not for necessaries;

But where an infant(*z*), being in trade as a retail grocer, was supplied with groceries in considerable quantities for his shop, and it was proved that the tea, sugar, &c., used by him in his housekeeping, was part of the goods so supplied, he was held liable for so much of the goods as had been so used.

Goods used in housekeeping are necessaries;

An infant may contract for the use and occupation of necessary lodgings, and he will be liable on *assumpsit* for a reasonable rent, though not on his covenant in a lease to pay a fixed rent. But where an infant, in low circumstances(*a*), hired a house containing five rooms, at the yearly rent of £15, and

and lodgings;

(*t*) *Charters v. Bayntun*, 7 C. & Stra. 1083; *Dilk v. Keighley*, 2 P. 52. Esp. 480; *contra*, *Anon.*, Bull.

(*u*) See also the next section. N. P. 154.

(*x*) *Supra*, p. 489; *Dilk v. Keighley*, 2 Esp. 480; *Lowe v. Griffith*, 1 Scott, 458. (*z*) *Turberville v. Whitehouse*, 1 C. & P. 94; see *Hill and Blackton's case*, cited 1 Sid. 112.

(*y*) *Whittingham v. Hill*, Cro. Jac. 494; *Whywall v. Champion*, 458. (*a*) *Lowe v. Griffith*, 1 Scott, 458.

there carried on his business as a barber; an action having been brought for the rent, the judge left it to the jury to say whether the house was a necessary dwelling for a person in the circumstances of the defendant, and such as an infant could contract for; and the jury having found for the defendant, the Court refused to disturb the verdict.

but not if
hired for im-
moral pur-
poses.

Where it was shewn (*b*) that a lodging was let to a female infant for purposes of prostitution, and with a knowledge on the part of the landlord of that fact, the action was held not to be maintainable.

Necessaries for
infant servant.

A master may deduct from the wages of his infant servant any advances which he may have made for necessaries; but money paid for coach fares for the mother of a servant is, of course, not within this description (*c*).

Necessaries for
wife or child of
infant are neces-
saries for him.

Necessaries for an infant's wife are necessaries for him, but it is said that if they were provided in order for the marriage, he is not chargeable, though she uses them (*d*). This can only be on the principle, that an infant does not, on marriage, become liable for his wife's previous engagements. Whether he becomes liable on attaining full age, does not appear to have been decided. Necessaries for an infant's lawful child are necessaries for him (*e*).

Money ad-
vanced to pro-
cure discharge
of infant from
arrest.

Money advanced to procure an infant's discharge from an arrest is money advanced for necessaries, and was recoverable in *assumpsit* (*g*); but the plaintiff was obliged to shew before the abolition of arrest on *mesne process* (*h*), either that the infant was in execution, or if not, that the debt paid was for necessaries, otherwise the infant might be subjected to the payment of the money advanced to liberate him from an arrest for a demand for which he could not legally be made liable.

Where an action was brought to recover a sum of money

(*b*) *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 Bos. & Pull. 340; see *Girardy v. Richardson*, 1 Esp. 13.

(*c*) *Hedgley v. Holt*, 4 C. & P. 104.

(*d*) *Turner v. Tristly*, Stra. 168. See *Clarke v. Cobley*, *supra*, p. 496.

(*e*) Bacon's Max. 18.

(*g*) *Clark v. Leslie*, 5 Esp. 28.

(*h*) 1 & 2 Vict. c. 110.

advanced to liberate an infant from arrest in Scotland, and the defendant pleaded his infancy, it was held to be necessary for the latter to shew that infancy would by the law of Scotland, where the original contract arose, have afforded a good answer to the demand upon which he was arrested (*i*).

If all the articles for which the action is brought were of such a nature that they could not possibly be necessities for the infant, the judge may direct a nonsuit; and in the case of *Mackerell v. Bachelor* (*k*), the court appears to have decided the question upon demurrer: but according to the modern practice as stated by Lord Ellenborough, C. J., (*l*) the question of necessity has been submitted to the jury, with such a direction from the judge upon the law as the circumstances required, and therefore if any part of the articles might be strictly necessities, the question ought not to be withdrawn from the jury.

Where nonsuit will be directed.

It would seem from the case of *Hands v. Slaney* (*m*), that, if the jury give damages in respect of a part of the charge which was not really for necessities, this will afford ground for a new trial. In the case just mentioned, the judge had left to the jury the question of the necessity of certain cockades, and the jury had included their value in the damages. But Lord Kenyon, C. J., said on an application for a new trial, that the cockades could not be considered as necessities for the defendant, and ought not to have been included in the damages, though it could not be worth the defendant's while to be at the expense of another trial to apportion the damages. The rule for a new trial was discharged, *the plaintiff's counsel agreeing to strike out the amount of the cockades*.

Damages for things not necessities; ground for new trial.

But in the recent case of *Peters v. Fleming* (*n*), where some articles had been included in the damages, which the Court, on cause shewn against a rule for a nonsuit or new trial,

(*i*) *Male v. Roberts*, 3 Esp. 163. (*l*) *Maddox v. Miller*, 1 M. &
 (*k*) *Supra*, p. 499. See also S. 738.
Rainsford v. Fenwick, Carter, (*m*) 8 T. R. 578; *supra*, p. 500.
 215. (*n*) 6 M. & W. 42; *supra*, p. 500.

held not to have been necessities; the rule was discharged absolutely, and the amount of the unnecessary articles was not struck out of the damages, as in the case of *Hands v. Slaney*. Perhaps it may be inferred from the following observation of Mr. Baron Gurney, that the defendant did not press this point, but relied on the argument, that no question ought to have been left to the jury at all. His Lordship said: "In this case the jury have found that these articles were necessary: as to two of them, it appears to us the jury were right, and it is admitted that it is not worth while to discuss the precise amount (o)."

Control exercised by Court over juries.

"The question of necessities," said Tindal, C. J., in a late case (p), "is a question of fact for the jury, but subject to the control of the Court as to the manner in which the jury exercise their discretion."

In the case just cited, an action was brought for the hire of horses, saddles, and harness; and upon a plea of infancy, and replication of necessities, it appeared at the trial that the defendant was an Oxford under-graduate; and the plaintiff gave no evidence that the articles were necessities, except that the defendant kept a horse and occasionally hunted with his father. The judge told the jury he was of opinion that the plaintiff was not entitled to recover; but the jury returned a verdict for the full amount of his demand, which was under £20. The Court of Common Pleas held that the verdict was perverse, and that the defendant was entitled to a new trial without payment of costs.

A horse it seems may be within the description of necessities, in various cases;—as, if the infant has been ordered by a medical man to ride(q).

Whether infant

There is a dictum of Haughton, J., in an old case (r), that

(o) See *Brayshaw v. Eaton*, 5 Bing. N. C. 231.

(p) *Harrison v. Fane*, 1 Sc. N. S. (C. P.) 287; S. C. 1 Man. & Gr. 550.

(q) *Hart v. Prater*, K. B., 1 Jurist, 623; see *Clowes v. Brooke*,

Str. 1101.

(r) *Tirrell's Case*, 2 Rolle's Rep. 271.

if an infant has houses, though it be necessary to keep them in repair, yet a contract for this purpose does not bind him, for he is bound by no contract but such as concerns his person; and the same doctrine is laid down in an anonymous case in *Salkeld* (s).

liable for repairs of house, as necessaries;

A copyhold estate (t) devolved on the defendant when he was an infant of six years of age; a fine was assessed, and he was admitted to the estate on coming of age. *Assumpsit* was brought for this fine; and upon the case reserved, the question was, whether *assumpsit* would lie for the fine, which the jury found to be a reasonable one. The Court held clearly that the action lay, as the defendant had confirmed the transaction by his conduct since he came of age; and Yates, J., observed, that if *assumpsit* had been brought against the infant during his minority, it would have lain; that if an infant be bound for necessaries, *à fortiori* he is for an old fine, which is necessary to enable him to receive the rents and profits of his estate, thereout to provide necessaries (u).

—or ancient fine for copyhold.

If a man lends money to an infant to be laid out in the purchase of necessaries, he cannot maintain an action at law for the money so lent, whether it has in fact been so laid out or not; and he will not even be permitted to give in evidence that the money lent was so laid out: for by lending money to the infant, he puts it in his power to misapply it; and as it

Action does not lie for money lent to infant for purchase of necessaries.

(s) *Anon.*, 3 Salk. 190.

(t) *Evelyn v. Chichester*, Bull. N. P. 164; 3 Burr. 1717.

(u) He cited the case of *Kirton v. Elliott*, 2 Bulstr. 69, where the plaintiff recovered against an infant the rent upon a lease made to him; and where it is said, "If a lease be made of an acre of land to an infant, rendering a hundred pounds rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent." But in 1 Roll. Ab. 731, pl. 45, the same

case is mentioned by the name of *Kettle v. Elliot*, as deciding only that if a lease for years be made to an infant rendering rent, and the rent is in arrear, and then the infant comes to his full age, and afterwards continues the occupation of the land, this will make him chargeable for the arrears of rent incurred during his infancy. For the modern method of raising fines due from infant copyholders, see p. 327, *supra*.

Secus, where money applied under eye of lender.

is upon the lending that contracts for re-payment must arise, the infant's applying the money afterwards for necessaries will not, by matter *ex post facto*, entitle the plaintiff to an action (x). But if the infant has so laid out the money under the eye of the lender, and merely as his agent, probably the plaintiff might recover the amount, by declaring as for money so laid out, and not so lent (y).

And the money is recoverable in equity.

And if a man lends money to an infant to pay a debt contracted for necessaries, and in consequence the infant does pay for necessaries, the infant must be liable in equity, for the person who lent the money ought in equity to stand in the place of the person who furnished the necessaries. Thus, where an infant borrowed money, with which he bought necessaries, and on attaining full age made his will, devising his real estate to trustees for the payment of his debts with interest; it was decreed that the money so borrowed was within the trust (z).

How the question of necessaries must be raised in pleading.

Where infancy is pleaded in answer to a demand, the replication should raise the question of the necessity of the articles to the infant, or of their necessity to something necessary for him, as all the circumstances of the infant's health and fortune may thus be considered. Thus in *assumpsit* for a farrier's bill (a), in answer to the plea of infancy, the plaintiff replied that the demand was for looking after the infant's horses, and that the work was necessary for the horses. On demurrer, the Court held that the replication was bad, for it should only have been a general replication, that it was necessaries for the infant, (or, according to one report (b), that it was for his horses, kept by him for his necessary use): and though the work might be necessary for the horses, yet *non constat* the horses were necessary for the infant.

(x) *Darby v. Boucher*, 1 Salk. 279; *Earle v. Peale*, Ibid. 386; 10 Mod. 67; *Probert v. Knouth*, 2 Esp. 472, (n.)
 (y) See 10 Mod. 67; and *Ellis v. Ellis*, 5 Mod. 368; 12 Mod. 197.
 (z) *Marlow v. Pitfield*, 1 P. W. 558; see *Harris v. Lee*, Ibid. 483.
 (a) *Clowes v. Brooke*, Stra. 1101.
 (b) Andr. 277.

In an older case, where *assumpsit* was brought for labour and medicines in curing the defendant, the defendant pleaded infancy; the plaintiff replied that it was for necessities generally; and upon a demurrer to this replication it was objected, that the plaintiff had not assigned in certain, how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good (c).

If infancy is pleaded in answer to an action of *assumpsit*, the plaintiff must aver that the articles were necessities for the infant's use; and if he does not make such averment, but demurs to the plea, it shall not be intended that the demand is for necessities, and there shall be judgment for the defendant (d).

Even where the plaintiff has succeeded in shewing that the supplies, in respect of which the action is brought, were suitable in themselves to the age and station of the defendant; the latter may shew that he was supplied, no matter from what quarter, with necessities suitable to his situation; and in such a case, a tradesman cannot recover for any further supply.

Infant may shew that he had necessities *aliunde*.

It has been laid down (e), that, if an infant lives with his parent, who provides such apparel as seems to the parent to be proper, so that the child is not left destitute of clothes or other real necessities of life, the child cannot bind himself to a stranger for what might otherwise be allowed as necessities; for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time it shall be purchased, or of whom.

What circumstances will prove this.

An infant, a glover's apprentice (g), lived in the house of his stepfather, who provided clothes for him suitable to his situation. The infant was supplied with other clothes, in ad-

(c) *Huggins v. Wiseman*, Carth. 110.

(e) *Bainbridge v. Pickering*, 2 W. Bla. 1325.

(d) *Ive v. Chester*, Cro. Jac. 560; Com. Dig. Pleader, (2 W. 22).

(g) *Cook v. Deaton*, 3 C. & P. 114.

Tradesmen
should make
inquiry.

dition, by a tailor. Best, C. J., held, that the tailor ought to have made inquiries of the step-father; and that, as there were proper clothes provided by the latter, the others could not be necessary.

Where an infant (*h*), not living with his father, but provided by the latter with all things necessary for his support, received clothes on credit from A. B., a tailor; and also, without the knowledge of A. B., contracted debts with other tailors during the same period, which the father paid to a considerable amount: Lord Kenyon, C. J., held, in an action brought by A. B., that the tradesman is bound to inquire what dealings the infant has with others; and if the infant has contracted other debts at the same time, for the same sort of articles for which the action is brought, this is good evidence to rebut the presumption of necessities.

In a similar case (*i*), where clothes were furnished by a tailor to an infant of seventeen, on his own credit, and it was proved that he had been properly supplied with clothes by another tailor on his father's credit; Lord Tenterden, C. J., held, that the clothes supplied to the infant on his own credit were not necessities; and he observed, that, if a tradesman trusts an infant, he does it at his peril, and he cannot recover, if it turn out that the party has been properly supplied by his friends.

Where inquiry
may be dis-
pensed with.

But although it is prudent in a tradesman to make inquiry into the circumstances of the infant, the inquiry is not essential to his right to recover (*k*). And inquiry may (so far as regards the case which the creditor is to make out at the trial) be rendered unnecessary by the open sanction of a parent; as, where a mother sat in her carriage, while her daughter purchased expensive goods at a shop, and some of the goods were taken away in the carriage, others delivered at the

(*h*) *Ford v. Fothergill*, 1 Esp. 21; Peake, N. P. C. 229. (*k*) *Brayshaw v. Eaton*, 5 Bing. N. C. 231.

(*i*) *Story v. Pery*, 4 C. & P. 526.

hotel where the mother and daughter were residing; so that the jury might fairly infer that the whole had come under the mother's inspection (1).

In a modern case (m), governed by the principle of *Ford v. Fothergill*, it was ruled, that the defendant might go into evidence to shew, that he had all the clothes which were suitable to his estate and degree from other tailors than the plaintiff; and that, if he, in fact, had such clothes from them, it made no difference that he had not paid for them, or even that he had successfully defended an action brought by one of them to recover the price of the goods supplied by him.

It is enough for infant to shew he had necessities *aliunde*, whether paid for or not.

Thus it appears, strangely enough, that an infant may resist many demands more easily than one; and that if he has credit with a sufficient number of tradesmen, he need not pay any of them.

Consequences of this doctrine.

Where an infant had an allowance of £500 a year, besides his pay as a captain in the guards (n), Sir L. Shadwell, V. C., expressed an opinion, that a tradesman would not be at liberty to furnish him with necessities on credit, when he might have known, if he had made inquiry, that the infant was supplied with an income for his own support. And on the trial of an issue directed by Lord Lyndhurst, C., (in the same case (o)), Lord Abinger, C. B., in summing up, directed the jury to the same effect. But the Court of Exchequer granted a new trial, with the full assent of Lord Abinger; who laid it down, in giving judgment, that a minor is, by law, capable of entering, not merely into a contract for necessities for *ready* money, but into any reasonable contract for necessities, though he may have an income of his own.

Infant may contract either for ready money, or on credit, though he may have an allowance.

An infant may bind himself, in the words of Lord Coke, "for his good teaching and instruction, whereby he may profit

What kinds of instruction are necessities, *query?*

(1) *Dalton v. Gib*, 5 Bing. N. C. Robinson, 458. 199.

(n) *Mortara v. Hall*, 6 Sim. 465.

(m) *Burghart v. Angerstein*, 6 C. & P. 690; S. C. 1 Moody & W. 727. (o) *Burghart v. Hall*, 4 M. &

himself afterwards;" and this comprehends that general education which is required by his situation in life (*p*); but special instruction, with a view to the exercise of a particular calling, has, in one case, been excluded from the operation of the rule.

Where a brother advanced £40, as a premium for taking his sister as an apprentice to learn millinery, Lord Kenyon declared himself of opinion, that this sum of money could not be considered as necessaries, and therefore, that the payment could not be enforced in a court of law (*q*).

SECTION II.

Liability of Father or Guardian for Articles furnished to Infant.

Implied contract of infant to pay for necessaries is taken away by agreement of a third party to do so.

Parents usually procure necessaries for children on their own credit.

As to liability, at common law, of parent for maintenance of deserted child, *query?*

It was laid down in an old case (*r*), that, if an infant comes to a stranger and boards with him, there is a contract in law implied, that he should pay for his board as much as it is worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract.

It is usual for parents, in discharge of their moral obligations, to procure necessaries on their own credit for their children; but whether, by the common law, a parent is bound to maintain his deserted legitimate child, has lately been treated as an undecided question (though Lord Denman, C. J., stated his opinion in the affirmative, at *Nisi Prius*) in a case which turned upon a different point, a stranger having undertaken to maintain the child (*s*). In the argument in

(*p*) *Manby v. Scott*, 1 Sid. 112; (*r*) *Duncombe v. Turbridge*, 9 Pickering v. Gunning, Sir W. Vin. 392.

Jones, 182; S. C. Palmer, 528. (*s*) *Urmston v. Newcomen*, 6 Nev.

(*q*) *Smith v. Gibson*, Peake's & M. 454. Additional Cases, 52.

this case, counsel cited an opinion of Lord Eldon, C. J., at *Nisi Prius*, which has been reported in the following words:—

“ I do not lay it down as the law, that, where the children live away from the father, he is liable, because the things furnished are necessaries. As a father, he has a right to the custody of his children, and may obtain possession of their persons by Habeas Corpus; but when he does not assert that right, and suffers them to remain with their mother, I think he thereby constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries (†).”

These words, taken literally, seem rather too comprehensive; and it is conceived, that authority from the father cannot be implied *solely* from the fact, that he allows his children to remain with another person. Thus, where a wife, in the absence of, and unknown to her husband, contracted for the board of his daughter, aged seventeen, who, after some time, was removed by her to another situation; and, in an action by the person with whom she was last placed, the husband was proved to have paid for the first board, although he expressed some disapprobation of it:—it was held, that the husband had thereby so far acknowledged the discretionary power of the wife to contract for this purpose, as to make him liable to the plaintiff upon the second contract (u). And if children be left by their father under the protection of a servant, the latter has, by implication, authority to provide medical assistance on the father's credit, if the children meet with an accident, though it occurred from the carelessness of the servant (x).

Semble, that the parent does not become liable solely by letting children remain with another.

An account has been given above (y) of the statutory provisions on this subject; and the opinion of Blackstone has

Statutory liabilities of parent.

(†) *Rawlins v. Vandyke*, 3 Esp. 3rd ed. N. P. C. 250.

(x) *Cooper v. Phillips*, 4 C. &

(u) *Forsyth v. Milne*, K. B. 1808; P. 581.

Paley on Principal and Agent, 120, (y) Chap. 21, pp. 210, 212.

n. (z); Chitty on Contracts, 148,

The cases have
turned on con-
tract of father :

been stated, that the father is only obliged to find his infant children with necessaries: the penalty, on refusal, being no more than twenty shillings a month. It is sufficient here to add, that the disputed cases have generally arisen on the question, how far the father has pledged his credit for his child.

He is liable on
his contract,

express or im-
plied, original
or by adoption.

There can be no doubt, that, if a father orders any supplies for his infant child, or does any act from which it may reasonably be inferred that he has authorized the child to contract a debt, or has adopted the contract afterwards, he will be liable in respect of such a debt. The difficulty of implying such a liability on the father's part will be much increased, if the child is properly supplied with necessaries by him; or has, either from him, or from some other quarter, a fixed income for his support.

Giving an
allowance ne-
gatives impli-
cation of con-
tract.

Where a father residing in the country placed his son with a tradesman in London, and made him an allowance (z); an action having been brought against the father for clothes furnished to the son: Lord Kenyon, C. J. observed, that the son was himself *primâ facie* liable for the goods, as being necessaries; that a father may be liable for necessaries furnished to his son on his credit; but when he gives his son an allowance, that is in lieu of all charges.

Where con-
tract will be
implied.

Clothes were furnished (a) to a cadet at Woolwich, aged fifteen, whose father lived at Uxbridge. It was laid down by Burrough, J., that an action can only be maintained against a person for clothes supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first furnished without his knowledge, and he has adopted the contract afterwards; that such adoption may be inferred from his seeing his son wearing the clothes, and not returning them, or making some objection at, or soon after the time when he knows of their being supplied.

It appears, however, from the following case, that the cir-

(z) *Crants v. Gill*, 2 Esp. 471.

(a) *Fluck v. Tollenache*, 1 C. & P. 5.

cumstance of the father having seen the son wearing the clothes is not a conclusive proof of the adoption of the contract by the former (*b*).

A person aged nineteen, who had a salary of £90 (*c*), ordered clothes, without his father's authority, from a tailor who lived in the neighbourhood; and the father saw him wearing the clothes. The tailor's bill was in the first instance sent in to the son; but, eventually, an action was brought against the father for the amount. Gurney, B., held, that the plaintiff ought to have made inquiries of the defendant before he furnished the clothes, and that the latter was not liable.

In another case (*d*), a father placed his son at a military college, and paid his expenses there; the son obtained a commission in the army, and ordered regimentals in London, (the father living in Devonshire). An action was brought against the father for the value of the regimentals. L. C. J. Abbott said, that, if it had appeared in evidence that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, the circumstances might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing, however, of this nature had been proved, and since the articles themselves were necessary for the son, and suitable to that situation in which the defendant had placed him, it was for the jury to say whether they were not satisfied that an authority had been given by the defendant. The verdict was for the plaintiff.

In the case of *Nichole v. Allen* (*e*), an action was brought against a man for the board and lodging of his illegitimate daughter, between the years 1823 and 1825. She had been

Liability for
illegitimate
child.

(*b*) See also *Law v. Wilkin*,
infra, p. 514.

(*d*) *Baker v. Keen*, 2 Stark. N.
P. C. 501.

(*c*) *Rolfe v. Abbott*, 6 Car. & P.
296.

(*e*) 3 C. & P. 36; see *Furillio*
v. Crouther, 7 D. & R. 612.

boarded by the plaintiff since 1811, with the knowledge of the defendant, who acknowledged her, and had once allowed £12 a year for her support.

Lord Tenterden, C. J., said, "There is not only a moral, but a legal obligation on the defendant to maintain his child; he knows where she is, and he expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shewn that she is maintained in the plaintiff's house, and that he knows it; and then it lies on the defendant to shew that she is there against his consent, or that he has refused to maintain her any longer at his expense." On this case, Lord Abinger, C. B., observed, in *Mortimore v. Wright* (g), that it was only a *Nisi Prius* decision, and that he could not assent to any such doctrine (h).

What constitutes adoption of contract.

In the case of *Law v. Wilkin* (i), a boy was sent to school much in want of clothes; his father had not authorized any one to supply him, but clothes were furnished to him without authority by a tailor. When he went home for the holidays, he took the clothes with him. He returned to school with them; and it might be inferred from the evidence, that the father had seen them, though there was no direct proof of the fact. An action was brought against the father; and Parke, B., directed a nonsuit. The Court of Queen's Bench, however, granted a new trial, on the ground that it ought to have gone to the jury to say whether there was an implied authority from the father, that the clothes should be furnished. Lord Denman, C. J., observed, that a father is properly liable for any necessary provision for his infant son, that there was no evidence that he had supplied, or authorized a supply of clothes from any other quarter; that if he had wished to relieve himself from liability, he might have proved that he took such steps to provide for his son as rendered this

(g) 6 C. & P. 482.

(h) See chap. 21, *supra*.

(i) 6 Ad. & El. 718; 1 N. & P.

607.

supply unnecessary. This decision was subjected to grave criticism in the case of *Mortimore v. Wright*, mentioned below.

In another case (*k*), it was ruled, that a schoolmaster has no authority to cause his pupil to be supplied with wearing apparel without the sanction, expressed or implied, of the parent or guardian, though the scholar may really want the supply.

Schoolmaster must not order clothes for pupil without authority.

In the case of *Blackburn v. Mackey* (*l*), necessary supplies of clothes were furnished by a tailor to an infant, who was an attorney's clerk in London, receiving a guinea a week as wages. His father lived in the country, and gave him no allowance or supply of any kind. The tailor sent in two bills to the father, who wrote to him in reply, that he did not pay bills for his son, but concluded with the words, "however, I have no great objection to paying your first bill, if you will send a friend with a receipt, for I do not send money by letter." L. C. J. Abbot left it to the jury to say whether the father made the offer of payment as a favour, or whether he meant by it to admit an original liability for the first bill; and on this point the jury found for the plaintiff.

What amounts to admission of father's liability.

In *Mortimore v. Wright* (*m*), an action was brought against a man whose son had boarded and lodged with the plaintiff for some time, during part of which he had earned wages, and had paid for his board and lodging; he afterwards fell ill, and was unable to pay for the necessities with which the plaintiff continued to supply him. She applied to his father for money, and the latter wrote in reply, that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be twenty-one, and would then be able himself to pay what he owed her. Rolfe, B., out of deference to the authority of *Blackburn v. Mackey*, declined to nonsuit the plaintiff, and the jury gave

(*k*) *Clements v. Williams*, 8 C. & P. 58.

(*l*) 1 C. & P. 1.

(*m*) 6 Mee. & W. 462.

Latest state-
ment of the
law.

a verdict in her favour; but the Court of Exchequer afterwards gave leave to enter a nonsuit. Lord Abinger, C. B., observed, in pronouncing the judgment of the Court: "In point of law, a father, who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. *Law v. Wilkin*, as it stands, appears to sanction the idea, that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative, which is a doctrine I must altogether dissent from. If a father does any specific act from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts, and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person."

On the same occasion, Parke, B., expressed his dissent from the decision of the Court of Queen's Bench, in *Law v. Wilkin*, and concurred with Rolfe, B., in observing that *Blackburn v. Mackey* might possibly be supported, though they doubted much, whether, even in that case, there was any evidence for the jury.

How far father
has a right to
earnings of
child, query?

The question, how far a father has a right to the earnings of his child, seems closely connected with the subjects which have just been treated of.

Blackstone states that "a father may have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants (n)."

(n) 1 Bl. Comm. 453.

A daughter petitioned (o) to be let in as a creditor on the estate of her father, become bankrupt, for the money he received from the managers of the theatres on her account, offering an allowance thereout for living with, and being maintained by him during the time of her acting on the stage. It was urged that the Court is so far from giving the father all the earnings of a child, as not to suffer a father to be eased of the maintenance of a child who has a fortune, but will let the whole interest accumulate, and the father maintain the child, unless unable to do so.

Lord Chancellor Hardwicke said, "I am under some difficulty for the sake of the precedent; for it is true, that the question is the same now as it would have been between the daughter and the father, if he had not been a bankrupt, and could answer to an action for himself, whether after all this transaction, the daughter could in an action have recovered against the father all this money, as money had and received to her use. It may be dangerous in London to lay it down as a general rule, that if a father having several children, who earn money, which he receives, becomes bankrupt, every child can come and claim his debt for that money had and received while they lived together and were part of his family; that might have a very dangerous consequence. A father frequently sends out his son to work as journeyman, and his earnings are taken to be the father's. Here the father, mother, and daughter were all actors, and lived together; the father received the whole. It is extraordinary to say, that after a length of time, this shall be all called back, because of an act of bankruptcy. I will refer it, therefore, to the commissioners to inquire how much the father received to the child's use, unless as to so much as was a covenant with the daughter herself."

It is evident that the daughter's claim was felt to be, to a

(o) *Ex parte Macklin*, 2 Ves. 675.

certain extent, well-founded (*p*); for, in order to avoid the expense of an account, it was agreed, that she should be admitted as a creditor for a particular sum; but no allowance to be made for maintenance.

(*p*) See p. 249, *supra*. It seems that the infancy of a female who has been seduced, does not affect the right of a father or other relative to maintain an action of damages for the seduction. See Selw. N. P. 1103, 10th ed., and the cases there collected.

CHAPTER XXXVIII.

CONTRACTS OF INFANTS ON MARRIAGE (*a*).

SECTION I

Where Infants' Property is not bound.

THE general incapacity of infants to contract has been already stated. But as they have always been allowed to enter at an early age into the marriage contract, the most important of all, their capacity to form those subsidiary agreements as to property, which usually accompany marriage, has furnished a subject for protracted discussion.

It appears, indeed, that the true principles of the law of infancy, as applicable to these contracts, were familiar to Lord Chancellor Nottingham, who held, in a case which came before him for decision (*b*), that an infant could not contract for her real, though she might for her personal estate; and that articles to settle the former were void, though her mother and all her friends were privy, and consented to her agreement.

Real estate of
female not
made.

But it afterwards became a question, whether the real estate of an infant could be settled on marriage.

In the case of *Cannel v. Buckle* (*c*), Lord Macclesfield put the following case, by way of illustration:—Suppose a female infant seised in fee, on a marriage with consent of her guard-

History of the
doctrine.

(*a*) See chap. 20, *supra*.

from Lord Nottingham's MSS.

(*b*) *Salisbury v. Bagott*, 2 Swanst.

(*c*) 2 P. W. 242.

ians, should covenant in consideration of a settlement to convey her inheritance to her husband; if this were done in consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages.

Lord Hardwicke has observed (*d*), that “this is going a great way, as it related to the inheritance of the wife; but yet there are cases where the Court will do it; as, if the lands of the wife were no more than adequate consideration for the settlement that the husband makes, and, after the marriage, the wife should die and leave issue who would be entitled to portions provided for them by the settlement; it would, in that case, be very reasonable to affirm that settlement.”

Notwithstanding these dicta, it is now established (*e*) (in accordance with the opinion of Lord Nottingham), that the real estate of a female infant is not bound, so far as she is concerned, by a settlement on her marriage; because the general incapacity of infancy invalidates her contract; and the contract of the husband cannot extend beyond the limited interest which he acquires by marriage.

Law settled,
and the reason.

In the case of *Durnford v. Lane* (*g*), an infant had entered into articles, previous to her marriage, for the settlement of her real estate. The husband and wife mortgaged the estate to persons who had notice of the articles. A bill was filed for specific performance, and Lord Thurlow expressed himself as follows:—“To decree a specific performance of the articles, the Court must carry the principle to this length: that a wife, making a wise settlement in her infancy, on the marriage, without any estate settled on the other side, is bound by the agreement; and that, even if the husband had died, she must have continued to be bound. I cannot think an in-

(*d*) *Harvey v. Ashley*, 3 Atk. *May v. Hook*, *supra*, p. 466; 1 Bro. 615.

(*e*) See 2 R. & My. 376.

(*g*) 1 Bro. C. C. 106; see also

C. C. 111, (n.); *Pearson v. Pearson*, 1 Bro. C. C. 111, (n.)

fant, only covenanting as to her estate, can be bound. If she is so at all, it must be in reference to her marriage. Nobody has yet said, that, merely by its being upon marriage, she is bound; but it is said, that, upon a competent settlement, she would be bound. I think the Court should not go on into the competence of the settlement. I must lay down, that every settlement shall be considered as good, till shewn to be fraudulent. The cases have not gone so far, nor does my opinion. If she had a settlement from her husband, and, after his death, she had taken possession of it, I think she would be bound by the equity arising from her own act. I say this in deference to *Cannel v. Buckle*, and *Harvey v. Ashley*. I think she is not bound, unless she has availed herself of the settlement of the husband. In this opinion, I cannot say the whole property is bound, or decree the articles to be specifically performed."

The result was, that Lord Thurlow held the husband bound by his own covenant; leaving the question open, how far it bound the wife. He ordered the mortgages to be assigned to the trustee of the settlement; but the profits of the estate during the life of husband and wife to be applied to the payment of the mortgages, without prejudice to the remedies, either of the mortgagees, or of the wife (if she survived her husband), against the husband or his estate. A receiver was appointed, and it was declared, that, after the death of husband and wife, the trustee was to hold the estate, subject to the trusts in the settlement.

Lord Thurlow afterwards decided the point expressly. Previous to the marriage of an infant (*h*), articles (to which she and her guardian were parties) were entered into for settling her estate, along with certain land belonging to her husband. After the husband's death, a bill was brought on behalf of the children of the marriage, praying that the arti-

(*h*) *Clough v. Clough*, 3 Woodd. 453; 4 Bro. 510; 4 Cru. Dig. 20; see 5 Ves. 717.

cles might be established and specifically performed. The widow, by her answer, insisted that she had done nothing after her full age, to affirm the articles; and therefore, that her estates were not bound; waiving any right under the articles in the lands of her late husband. The decree declared, that her estate was not bound by the articles; and the bill was dismissed without costs.

Where there was a covenant in an infant's marriage settlement (i), that whatever should come to her, or to the husband in her right, from her mother, or *otherwise*, should be brought into settlement; the wife took some real estate for life, under her mother's will, and some by descent, as tenant in tail. Lord Thurlow considered the word "*otherwise*," to relate to the mother only. He also held, that neither the devised nor the descended real estate was bound by the settlement (j).

Personalty
given to sepa-
rate use of fe-
male not
bound.

Where personal property has been settled to the separate use of an infant, it is not bound by any marriage settlement; as the husband takes no interest in it, and the settlement must, in such a case, rest merely upon the contract of the infant, which is invalid (k).

Wife may
affirm settle-
ment at full
age, and hus-
band must not
aid in defeating
it.

A woman may, if she thinks fit, accede when of full age to a settlement made during her infancy. If she does not so accede, the conscience of her husband is bound not to aid her in defeating it, nor to do any act to prevent her confirming it, and any conveyance by them both will enure to the uses of the settlement. The wife, therefore, cannot effectually dispose of her real estate during the coverture, otherwise than according to the settlement (l); and it seems, that if the property comprised in the settlement consisted of leasehold for

(i) *Williams v. Williams*, 1 Bro. C. C. 152. (k) *Simson v. Jones*, 2 R. & My. 365; *Johnson v. Johnson*, 1 Keen, 648.

(j) It would seem, however, from the report, which is very imperfect, that there were some special reasons for considering the settlement void as against the wife. (l) *Durnford v. Lane*, 1 Bro. C. C. 115; *Milner v. Lord Harewood*, 18 Ves. 275.

lives, there could be no renewal during the coverture, except for the benefit of the persons interested under the settlement (m).

Where the settlement gives the wife an option to accede to it at twenty-one; Lord Eldon said, that even a partial accession would be considered an election to abide by the settlement (n).

The general incapacity of an infant to contract is the foundation of the rule, that the real property of a female infant cannot be bound by her marriage settlement. This principle applies with equal force to settlements made on the marriage of male infants, and the law was so understood by Lord Alvanley.

Real or personal estate of male not bound.

In the case of *Caruthers v. Caruthers* (p), his Lordship remarked, that it was alleged that great judges had laid it down, that the estate of a female infant would be bound by a settlement made under the authority of her guardians; and after shewing that this assertion was not borne out by the cases, he said, that it was impossible to apply the principle more strongly as to a female than a male infant; and that as to male infants, no such doctrine had been laid down. He considered the case of *Clough v. Clough* (q) to be an express decision by Lord Thurlow, that the contracts of male and female infants do not bind their estates.

In this respect there can be no distinction between the real and the personal estate of male infants, as the incapacity to contract exists with regard to property of every kind.

A case which seems at first sight to favour the notion of an infant's capacity to bind his estate by his marriage settlement, is stated and explained as follows, by Lord Northington, in the case of *Drury v. Drury* (r).

(m) 18 Ves. 276, 279, 280.

(n) Ibid. 276; see 3 Atk. 616.

(p) 4 Bro. C. C. 510.

(q) *Supra*, p. 521.

(r) 2 Ed. 57. His Lordship observes, that the case is not to be found in Lord Nottingham's MSS.

Apparent exceptions explained.

Coker was seised (*s*) of a church lease, in trust for Robert Strickland, an infant. On a treaty of marriage between the infant and the plaintiff, and in consideration of £1000, an indenture was made, with the consent of Coker, the infant's guardian, whereby the infant covenanted that the wife's life should be inserted by way of jointure; but there was no covenant by Coker, who sealed the indenture. The book says the marriage took effect, the husband (not saying then an infant) dies; the lease was surrendered, and the wife's life put in; she came for an assignment, and Coker claimed an incumbrance on the lease, which the Court postponed to the wife: the relief was against Coker's fraud, and no question was made on the infant's covenant.

In a later case (*t*), where a male infant's real estate was comprised in marriage articles, Lord Northington made a decree, declaring amongst other things, that a sum of money which the infant had covenanted by the articles to charge upon the estate, was a debt upon the estate. But there was reason to contend in this case, that the infant had confirmed the articles after attaining his majority (*u*).

Infant husband bound by covenant of adult wife as to her estate.

If, however, a male infant marries an adult female, who covenants that her estate shall be settled to certain uses, he is bound by her covenant when he comes of age.

A male infant married (*x*) an adult female, who covenanted that her estate should be settled to certain uses. Upon a bill filed by the trustees of the settlement, to have it carried into execution by the husband and wife; the husband insisted, that, being an infant when he executed the settlement, he was not bound by it. Lord Thurlow said, if a woman before marriage conveys her property, and agrees to settle her general expectations, when they shall fall in, and this be done without

(*s*) 27 Car. 2; 2 Cha. Cas. 211; see 3 Atk. 614. (*u*) See *Hollingshead v. Hollingshead*, *supra*, p. 475.

(*t*) *Lytton v. Lytton*, 4 Bro. C. C. 441, 455. (*x*) *Stoccombe v. Glubb*, 2 Bro. C. C. 545.

any fraud upon the intended husband, such an agreement must be executed; and the husband, when of age, must answer for her contract. It was not, therefore, necessary to discuss the other question, how far the infant husband could be bound by his own contract; for he went upon the covenant of the wife, who was adult. The husband's covenant operated no more than to shew his concurrence, and to take away every imputation of fraud from the transaction.

SECTION II.

Where Infants' Property is bound.

THE general personal estate of a female infant is bound by a settlement made on her marriage, because such personal estate becomes, by the marriage, the absolute property of the husband, and the settlement is in effect his settlement, and not hers (*y*); and it seems that the settlement operates equally upon the personal estate of the wife which becomes absolutely vested in possession in the husband, and upon choses in action, and chattels real which may survive to the wife, provided the husband lives to be entitled to reduce them into possession (*z*).

General personal estate of female bound.

Thus, in the case of *Williams v. Williams* (*a*), the husband having covenanted for himself, that what should come to him in right of his wife should be bound by the articles, it was decided that a chose in action, reduced by him into possession during the coverture, must be so applied.

Chose in action reduced into possession is bound.

Lord Hardwicke, on one occasion, used language favourable to the opinion, that the wife would, notwithstanding the settlement, be entitled by survivorship to choses in action not recovered by the husband.

How far chose in action not reduced is bound.

In *Ives v. Medcalfe* (*b*), a man and his intended wife, an

(*y*) 2 R. & My. 376; see p. 202, *supra*.

(*a*) *Supra*, p. 522.

(*z*) 1 S. & S. 485.

(*b*) 1 Atk. 63; see 2 Rep. H. & W., ed. Jac., p. 27, where this case

infant, covenanted by marriage articles, in consideration of the wife's portion, to release all the right and interest that might accrue to them out of her father's personal estate by the custom of London. The father died in the lifetime of the husband and wife, and a bill being filed against them for specific performance of the articles, Lord Hardwicke said that as to the objection of the customary part being a possibility, and merely in contingency, it was of no weight, for there was no doubt but it might be released in equity; but here it was a covenant which the defendant was bound by in all events, and it was no objection to say, the wife was under age; *for though in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be entitled to the customary share, as a chose in action, not recovered or received by the husband*; yet, he being alive, it was a matter that accrued to him in right of his wife, and he might release it, and his release would bind her; and, therefore, it was reasonable he should perform his covenant. His lordship founded his opinion too on an old law well known in the city by the name of Jud's law, whereby a husband was authorized to agree with the father for the wife, though she was under age.

In this case, the passage in italics was extra-judicial; and, whatever may have been Lord Hardwicke's opinion at one time, his judgment in the important case of *Harvey v. Ashley*, which is of later date than either of the cases just cited, must be taken as his final decision on the subject, as he gave it at great length and after much deliberation, although it is true that his decree might be supported upon another ground (*d*).

In the case of *Harvey v. Ashley* (*e*), the intended wife being

is cited along with *Bush v. Dalway*, was a party, would bind a contingent interest of the wife's, where the husband did not die before the contingency happened.
 (d) 3 Atk. 616.
 (e) 3 Atk. 613.

an infant, her contingent interest in certain personal property was comprised in the settlement. The husband died before the contingency fell into possession, and it was contended that this interest was not bound by the settlement, as it would not by the marriage have been transferred to the husband, dying before it fell into possession; but Lord Hardwicke held that it was bound, observing that if contingent interests of infants could not be settled before marriage, they might come absolutely into the power of their husbands, as where they fall into possession during the coverture.

The reasoning in this case from the inconvenient consequences of a different decision is not without weight. It is obvious, however, that as the wife being an infant could not contract, the contingent interest in question was considered to be brought into settlement by the contract of the husband, who did not in fact live to become entitled to it (*g*). And it may now be considered as settled, that choses in action, which the husband does not become entitled during the coverture to reduce into possession, are not bound by a settlement made during the wife's infancy. Lord Langdale, in a recent case (*h*), considered that choses in action which the husband became entitled to reduce, but did not actually reduce into possession, were bound.

By articles on the marriage of a female infant (*i*) it was covenanted that certain leasehold estates (*k*), to which she was entitled, should be settled to certain uses. No settlement was executed pursuant to the articles; the wife survived the husband. Sir John Leach, V. C., held that the leasehold estates were bound by the articles.

Chattels real,
surviving at
law, are bound.

(*g*) See 1 Bro. C. C. 111.

477.

(*h*) *Ashton v. M'Dougall*, 6 Jurist, 447.

(*k*) It is to be inferred from the report, that the leases were for

(*i*) *Trollope v. Linton*, 1 S. & S. years.

SECTION III.

As to the Assent of Parents and Guardians.

In what respect
assent is im-
portant.

IN the case of settlements by which the rights which marriage confers at common law, are prevented from ever arising, it will appear (*m*), that the assent of the parents, or guardians, of female infants, is important chiefly as affording evidence of the fairness of the transaction.

Where the subject of the settlement is property which belongs to an infant independently of the marriage, the expressions of several judges may seem to ascribe to parents and guardians a peculiar power of binding infants by agreements before marriage.

Dicta attribut-
ing efficacy to
it.

Lord Macclesfield said, in the case of *Cannel v. Buckle* (*n*), that an infant's inheritance would be bound by a covenant on marriage with consent of her guardians.

In the case of *Harvey v. Ashley*, Lord Hardwicke said (*o*), that if a parent or guardian could not contract for an infant so as to bind her money portion, the husband would be entitled to the absolute property in it immediately upon the marriage. In *Ainslie v. Medlycott*, Sir W. Grant observed (*p*), "It is said, the father and mother had a right to contract for the child; and very frequently agreements before marriage, upon behalf of infants by parents and guardians, would bind the infants; but here she was an adult," &c. In *Stamper v. Barker*, Sir John Leach said (*q*), "It is true, that the law of this Court permits a father or guardian of a female infant to contract, before marriage, on her part, with her intended husband, as

(*m*) See the next section.

(*p*) 9 Ves. 19.

(*n*) *Supra*, p. 519.

(*q*) 5 Madd. 164.

(*o*) 3 Atk. 613; see p. 614.

to her personal estate, because otherwise it would become his property."

The *dictum* of Lord Macclesfield has, however, been overruled (*r*), and although the language used by Lord Hardwicke, Sir W. Grant, and Sir John Leach, was naturally suggested by the fact, that the father or some protector of full age generally deals with the intended husband on behalf of the infant, yet it is probable that the meaning of the learned judges was quite consistent with Lord Thurlow's observation (*s*), that he could not conceive that the parents or guardians' consent could make an essential difference in the contract; which entirely agrees with the opinion of Lord Nottingham (*t*); no judicial decision has ever proceeded upon the ground that it did make any essential difference; and it is perfectly settled that the assent of parents or guardians does not bring within the operation of a marriage settlement any property which would not have been subject to it by the ordinary rules of law. Nor is any additional force derived from the sanction of the Court of Chancery itself.

Remarks.

Lord Thurlow's observations.

Assent does not affect rights of property;

nor does sanction of Chancery.

Thus, in the case of *Simson v. Jones* (*u*), on the marriage of a female infant, who was a ward of the Court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the Court, and the mother and guardian of the infant was a party to it. The settlement contained a power for trustees to sell the estate; but a sale made by them under the power, during the minority of the lady, was held by Sir J. Leach, M. R., to be invalid.

(*r*) *Supra*, pp. 521, 522.

(*t*) *Salisbury v. Bagott*, 2 Swanst.

(*s*) 1 Bro. C. C. 111; see 4 Bro. 608. *Supra*, p. 519.

C. C. 466.

(*u*) 2 R. & My. 365; *supra*, p. 202.

SECTION IV.

As to barring legal Rights by Jointure.

Ages of dower. LITTLETON states that (*x*) a woman is entitled to dower at the common law, if she be past the age of nine years at the time of the death of her husband ; but he makes it a question (*y*) whether in the cases of dowerment *ex assensu patris*, and dowerment *ad ostium ecclesie*, the wife shall have dower or not, if she be not past the age of nine years at the time of the death of her husband. Lord Coke answers (*z*) that "it seemeth, that these dowers being made by assent, &c., that the same are good [*i. e.* as against the husband's estate] albeit the wife be within the age of nine years, for *Consensus tollit errorem* (*a*)."

Jointures before the Statute of Uses. Before the Statute of Uses (*b*), the legal estate of the greater part of the real property in the kingdom was in the hands of feoffees to uses or trustees; the use or equitable estate was not subject to dower; and husbands provided for their wives (and frequently also for their children) by settling estates, which, being usually limited to the husband and wife jointly, acquired the name of jointures (*c*).

Provisions of statute ; legal jointure to bar dower. The Statute of Uses would have given an unfair advantage to many of the married women of that day, by vesting legal estates in their husbands, out of which they might have claimed dower, in addition to their jointures, if it had not provided for such cases in its sixth and three following sections. The effect of these clauses (which have a prospective and perpetual operation) is, that if before marriage lands or tenements be conveyed by the husband, or by his procurement, in such manner as to give the wife a legal estate

(*x*) Litt. s. 36.

(*y*) Sect. 42.

(*z*) Co. Litt. 37. a., 33. a.

(*a*) Both these kinds of dower

prospectively abolished by 3 & 4 Will. 4, c. 105.

(*b*) 27 H. 8, c. 10.

(*c*) Wilmot Opin. 185.

for her life at least, to be enjoyed immediately after her husband's death, she is barred of all claim to dower out of the remaining tenements of her husband. But this is on condition that she be not afterwards evicted, or lawfully ousted of her jointure (*d*), for in that case she is to be endowed to the extent of her loss.

Infants not being named in the statute, a question arose, in times comparatively modern, whether a female infant was barred of dower by a jointure made before marriage.

Infant is barred of dower by ante-nuptial jointure.

In the case of *Cray v. Willis* (*e*), Sir J. Jekyll, M. R., decided this question in the negative, but Lord Hardwicke took the opposite course in the cases of *Seys v. Price* (*g*) and *Harvey v. Ashley* (*h*). By the case of *Drury v. Drury* (*i*), in which the House of Lords, after consulting the judges, reversed a decree of Lord Chancellor Northington, it is now settled, that an infant may be barred of dower by a jointure made before marriage.

The principle of this decision seems to be (*k*), that the bar does not arise from the agreement of the woman to a jointure before marriage,—for in that case the argument founded on the incapacity of infants to contract would be unanswerable,—but from the energy and force of the act of Parliament, substantiating the settlement against her for this particular purpose, and preventing the right to dower from ever arising.

Principle of the rule.

But if the position, that an infant is barred of dower by a jointure made before marriage, were true without any qualification, it would be in the power of the husband to deprive his wife of dower by a mere illusory provision.

Jointure must not be illusory.

On this subject Mr. Justice Wilmot observed (*l*) in his

Observations

(*d*) See Burton on Real Property, p. 119. 219, (n.)

(*e*) 9 Vin. 249, pl. 18; Wilmot's ed. Toml. ; Wilm. Op. 177.

(*g*) Barnard. Ch. Rep. 117. (*k*) Wilm. Op. 194.

(*h*) 3 Atk. 607; Wilm. Op. (*l*) Wilm. Op. 209.

of C. J. Wil-
mot.

Fraud plead-
able at law,

and noticed in
equity.

Doctrine of
equitable join-
ture.

opinion given to the House of Lords in the case of *Drury v. Drury*, that a jointure made fraudulently to bar dower is not the jointure which the law acknowledges. It must be "a competent livelihood of freehold for the life of the wife." He considered that as a jointure made before the act could not have the least shade of fraud in it, so a jointure made under the act should be equally pure; that fraud might be pleaded at law, and the question of competency examined by a jury; having regard to the circumstances of the parties, their rank and quality; the proportion of the jointure to the quantum of the whole estate; the consent of parents or guardians in ascertaining it. He thought that a pocket jointure, made upon a woman without her privity, or upon an infant with her privity, without the interposition of parents or guardians, would be such an evidence of fraud, as would be sufficient to condemn it.

Lord Hardwicke had previously said, in the case of *Harvey v. Ashley (m)*, that if there was any collusion in making a jointure merely to bar the infant's dower, and not to make a provision for her suitable to her fortune and quality, these circumstances might alter the determination of a Court of Equity.

In his speech in the House of Lords upon the case of *Drury v. Drury (n)*, Lord Hardwicke said that the statute applied only to freehold estate in land, because that was the chief kind of property at the time of the enactment; but that many kinds of property had grown up since, and that every certain provision out of any of these, with consent of the wife, parents, or guardian, though not a jointure within the statute 27 H. 8, was good in equity; and he instanced jointures made out of the funds, out of trust estates, and out of copyhold lands (o). Eviction in equity would be like eviction at law, and would give a right to dower.

(m) Reported from the notes of (n) 2 Eden, 65, 66.

Sir Dudley Ryder, Wilm. Op.
ubi supra; see also 3 Atk. 612.

(o) See *Walker v. Walker*, 1
Ves. 54.

Drury v. Drury was a case of equitable jointure—an annuity of £600. The rental of the husband's real estate was £2600; the wife's fortune at the time of the marriage £2000. Lord Hardwicke, upon consideration of these circumstances, pronounced the jointure competent (*p*). Competence considered.

Lord Hardwicke's remarks as to equitable jointures are illustrated by the two following cases (*q*):—

By the custom of a certain manor (*r*), the first wife of a tenant was entitled to freebench in all her husband's lands of which he was seised during the coverture. A man, seised of copyholds within the manor, in consideration of marriage and a portion, covenanted with trustees to settle part of his lands to the use of himself and his wife, (who was an infant), for their lives, with a proviso that the lands settled on the wife should be in lieu of her customary estate. It was declared by Lord Chancellor King, that the lands so settled should be in lieu of the wife's customary estate, and that she was bound by this jointure, though under age and no party to the deed. Equitable jointure of copyhold bars freebench.

A man of full age and a female infant being each possessed of a leasehold house, by settlement made before their marriage, assigned both the houses to trustees, in trust for the intended husband for life, and after his death in trust for the wife for life. By the same deed it was declared that £1500 £3 per cent. stock, which the husband had purchased with his own money and with part of the intended wife's portion, and which had been transferred to the trustees, should be in trust Equitable jointure of leasehold and stock bars dower.

(*p*) Lord Eldon observed, in the case of *Milner v. Lord Harewood*, 18 Ves. 275, "that Lord Thurlow, who was much in favour of Lord Northington's opinion against the decision in the House of Lords, thought a female infant could not be bound by her covenant upon marriage as to her landed property, and that he, (Lord Eldon), concurred in that." These expressions do not bear out the statement (5 Ves. 717, (n.); 1 Bro. C. C. 106, (n.), ed. Belt.) that Lord Eldon agreed with Lord Northington and Lord Thurlow against the decision in the House of Lords.

(*q*) See 1 Rep. H. & W., ed. Jac., 479, (n.)

(*r*) *Jordan v. Savage*, Bac. Abr. vol. 2, ed. 1832, p. 749; S. C. 2 Eq. Ab. 102.

for the husband and wife during their lives, and the life of the survivor, and it was also declared that the provision made for the wife should be in full of her jointure, and in bar of dower. The husband died seised of estates of inheritance of the annual value of £1000, and upwards, and the yearly amount of the jointure was £152. Lord Loughborough thought the evidence sufficient to prove, that the wife was an infant at the time of the settlement; and he held that she was barred of dower and freebench by the jointure (s).

Uncertain or
precarious
jointure no
bar.

An infant will not be bound by a jointure, if her interest in the property settled, or the amount of the property itself, be uncertain or precarious.

As where in-
terest not in-
mediate.

In the case of *Caruthers v. Caruthers* (t), upon the marriage of a female infant, a certain estate, with the consent of her father, who, with her, was a party to the conveyance, was settled upon the husband's mother for life, with remainder to the husband for life; with remainder to the intended wife for life, in bar of dower. This jointure was bad at law, under the statute, because, by reason of the mother's life estate, it might not certainly take effect in possession at the death of the husband; and the question was, whether, in respect of the father's assent to this intended jointure, equity would make that good, which at law was clearly void.

Lord Alvanley decided in the negative. He said, that an infant could not be bound by a precarious provision; he thought, that *Drury v. Drury* did not decide that guardians had a power to bind the right of the infant, if the provision had not been certain, or if she was only to take upon a remote contingency; but in that case, the wife had a provision as certain as her dower; the Court, he said, would not perform an agreement, without seeing that it was reasonable.

In another case (u), the settlement made on the marriage of

(s) *Williams v. Chitty*, 3 Ves. S. 619.
545.

(u) *Smith v. Smith*, 5 Ves. 189.

(t) 4 Bro. C. C. 500; see 1 S. &

a female infant, provided that on the husband's death his personal estate should be distributed according to the custom of London; and that in case of his purchasing lands, the wife should, if she survived, have the same share of the lands as of the personal estate; and this was declared to be in lieu of dower and thirds. The husband afterwards became bankrupt. It was held, that the wife's right to dower was not barred by the settlement.

But it seems (x), that a jointure on an infant is not void, though the enjoyment of it may be uncertain, by reason of the husband's title to the settled property being defective. If the defect be cured, she will be bound to accept the jointure, in lieu of dower. If, on the other hand, the jointure fails, either in whole or in part, she will be entitled to recover the amount of the failure out of the lands of which she is dowable, as in other cases where a jointress is evicted.

If title to jointure property defective, jointure binds only pro tanto.

The result of the cases on this subject has been stated as follows, by Mr. Jacob (y):—

Review of the cases.

"The rule established by *Drury v. Drury*, and the other cases, appears to be, that a female infant may be barred of dower by an ante-nuptial settlement of any species of property, made with the assent of her parents or guardians, if the provision secured to her be reasonably certain and competent.

"There has not, indeed, been any express decision, that competency, in point of amount, is essential to an equitable jointure on an infant; but it appears to be a necessary consequence from the reasoning of *Drury v. Drury*, and *Caruthers v. Caruthers*, and from the general expressions, that the agreement will not be binding in equity on the infant unless it be reasonable (z). If the jointure be so scanty as to be merely illusory, it seems to be clear that it will not be established: on the other hand, it was decided in *Drury v. Drury*, that it

(x) *Corbet v. Corbet*, 1 S. & S. 486, (n.)
612; S. C. 5 Russ. 254. (z) 4 Bro. C. C. 513; see 1 Bro.
(y) 1 Rep. H. & W. ed. Jac. C. C. 153.

is not necessary that it should be equal in value to the dower; and it seems to be sufficient, if the provision be one which it was fair and prudent for the parent or guardian to assent to. It must be admitted, however, that the rule by which the validity of such agreements depends upon their being reasonable, leaves room for many questions, for the decision of which the cases do not furnish any certain criterion.

Whether assent
indispensable to
equitable jointure,
query?

“ Though the assent of parents or guardians is generally mentioned as material to the validity of a jointure on an infant, it does not seem to be in all cases indispensable. With respect to legal jointures, as they are, according to *Drury v. Drury*, binding independently of contract, when fairly made and conformable to the statute, the assent of parents or guardians is material only for the purpose of obviating any suspicion of fraud, and of evidencing the fairness of the transaction (*a*). It seems to follow that their assent is not necessary, if the fairness of the transaction appears from other circumstances, and the jointure be in other respects free from legal objections. Probably the analogy would be followed with respect to equitable jointures, at least where the want of the concurrence of a parent or guardian is reasonably accounted for; as, in case of their being dead or absent, or where, as in *Williams v. Chitty*, the settlement is made on the supposition of the wife being of age at the time.”

It must be observed, however, that Lord Lyndhurst (*a*) and Sir John Leach (*b*) have laid great stress on assent of parents or guardians to an equitable jointure.

Effect of stat.
3 & 4 Will. 4,
c. 105.

The old law on this subject has now become less important, since by stat. 3 & 4 W. 4, c. 105, women married after the 1st day of January, 1834, may be barred of dower, in any of the various ways mentioned in the act.

(*a*) 5 Russ. 257.

(*b*) 1 S. & S. 620; 2 R. & My. 377.

An infant may be barred (c), by a settlement or agreement before marriage, of her share, under the Statute of Distributions, of her husband's personal estate. In this case nothing depends upon the assent of the infant, but the husband, who has the power of excluding his wife by will, excludes her by the settlement; and where he, relying upon the validity of the settlement, omits to exclude her by will, it would be sanctioning a fraud upon him to permit her to take her distributory share in contravention of the settlement. This principle also applies to the widow's rights by the custom of London (d).

Infant barred of distributory and customary share by antenuptial agreement.

Whether an infant would be barred of her share under the Statute of Distributions, or of her share by the custom of London, by an antenuptial agreement by which no provision was made for her, does not appear to have been decided.

Where no provision for her, query?

Where a jointure was made upon a woman after marriage, she had a right to elect, upon the determination of the coverture, between the jointure and the dower or other legal rights for which it was substituted. A final and binding election could only be made by her deliberate act (e); but where a female infant married, and a jointure was made after marriage, and the husband died, leaving her an infant; if she, without doing any act to determine her election, married a second husband, and he entered upon the jointure estate; that entry would bind the husband and wife during the coverture.

Election where jointure post-nuptial.

(c) *Drury v. Drury*, 2 Ed. 70. 2 Vern. 724.

(d) *Ibid.*; see *Davila v. Davila*, (e) See 3 Atk. 617.

CHAPTER XXXIX.

OF THE EFFECT OF ACQUIESCENCE IN BARRING THE
CLAIMS OF INFANTS.

Laches not to
be imputed to
infant.

Exceptions.
Lapse.

Condition.

Condition for
payment of
double rent
not binding.

Operation of
fine and non-
claim.

IT is a maxim of law that laches is not to be imputed to an infant, because he is not supposed to be cognizant of his rights, nor capable of enforcing them. On this ground the right of entry was preserved for infants in many cases in which it was lost to persons of full age. But the privilege has always been subject to many qualifications: thus, there is a lapse if an infant patron does not present to a benefice within six months^(a); and in former times he lost his right to a villein by non-claim for a year and a day; and forfeited his copyholds by neglecting to pay his fine and to take admittance; and he may lose his estate by failing to perform a condition annexed to the estate^(b). So it is laid down^(c), that if a feoffment be made reserving rent, with a condition of re-entry in default of payment, if the person entitled under the feoffment be an infant and fail to pay, his laches shall bar him. But if the condition be for the payment of double rent on default, the infant does not forfeit the estate by his laches, because, according to the Statute of Merton, chap. 5, "*non currunt usurae contra aliquem infra ætatem existen'*." An infant was not barred by a fine and five years' non-claim, but if the time began to run in the lifetime of his ancestor, the infant heir was barred^(d); and so of the redemption of a mortgage^(e).

(a) Co. Litt. 246. a., 344. b. 348. a., 357. a.; *Salisbury v. Bagott*,

(b) *Supra*, p. 458; Co. Litt. 2 Swanst. 613.
380. b., 233. b.

(c) Co. Litt. 246. b. 418.

(d) See Co. Litt. 246. a., 344. b.

(e) *St. John v. Turner*, 2 Vern.

The Irish Ejectment Statute (*g*) provides that no proceeding under it shall prejudice any infants, but this is to be understood only of infants being tenants in possession, and not to those who have only rights in remainder; for if the rights of infant remainder-men were saved where the tenant for life was turned out of possession for non-payment of rent, the landlord might be prevented for ages from having his remedy of ejectment; whereas the meaning of the statute is, that the entry of the landlord should revest the property in him in the same manner as before the lease was granted (*h*).

Under Irish Ejectment Act, infant remainder-man bound by ouster of tenant for life.

Infants are bound by the Statutes of Limitations, except where specially exempted from their operation.

Infants bound by Statutes of Limitations.

The stat. 21 Jac. c. 16, fixes (*i*) various periods of limitation for the personal actions there specified; but the period is, in the case of infants, to be computed (*j*) from the date of their attaining majority, and not from the time when the cause of action arises.

Exemptions by stat. 21 Jac. c. 16.

By stat. 3 & 4 Will 4, c. 27, no person can make an entry or distress, or bring an action to recover any land or rent, but within twenty years after the right to make such entry or distress, or to bring such action, accrued to the claimant, or some person through whom he claims (*k*).

Stat. 3 & 4 Will. 4, c. 27.

Persons under the disability of infancy, &c., or persons claiming under them, may (*l*) (notwithstanding the twenty years shall have expired) make an entry &c., at any time within ten years after the person to whom the right first accrued has ceased to be under any disability, or has died; (which shall have first happened).

Exceptions in favour of infants.

In the case (*m*) of a person who was under disability at the time that his right accrued, dying under such disability, no fur-

(*g*) 11 Anne, c. 4, s. 8.

(*i*) Sect. 3.

(*h*) See *Baker v. Morgan*, 2

(*j*) Sect. 7.

Dow, 526; *Pentland v. Stokes*, 2

(*k*) Sect. 2.

Ba. & Be. 72; *O'Connors v. Lord*

(*l*) Sect. 16.

Bandon, 2 Sch. & Lef. 679.

(*m*) Sect. 18.

ther time beyond the term of 20 years next after the right accrued, or the term of ten years after the death of such person, is to be allowed by reason of the disability of any other person.

The same rules apply to suits for the recovery of any land or rent in equity (*n*).

Suits for legacies; time of limitation.

The period of limitation applicable to suits for legacies, is twenty years next after a present right to receive the legacy shall have accrued to some person *capable of giving a discharge* or release for it (*o*); and this comprehends all legacies, whether charged on land or not (*p*).

Suits in equity barred by time, like actions at law.

Where a man receives the profits of an infant's estate, and the latter, six years after he comes of age, brings a bill for an account, the Statute of Limitations is a bar to such suit, as it would be to an action of account at common law (*q*).

Statute does not bar a trust estate as between trustee and cestui que trust.

The principle, that the Statute of Limitations does not bar a trust estate, holds good only as between cestui que trust and trustee; and not between the cestui que trust and trustee on the one side, and a third party on the other side (*r*). This was the opinion of Lord Macclesfield, and of Lord Hardwicke; and in this sense we must understand the dictum of Sir J. Jekyll, M. R. (*s*), that the forbearance of trustees in not doing what it was their office to have done, shall in no sort prejudice the cestuis que trust (*t*).

(*n*) Sect. 24.

(*o*) Sect. 40.

(*p*) *Sheppard v. Duke*, 9 Sim. 567; see 2 M. & C. 309, (*n*.); 2 Sug. V. & P. 364, 10th ed.

(*q*) *Lockey v. Lockey*, Prec. Ch. 518; see *Gage v. Bulkeley*, Ridg. Rep. t. Hardw. 278.

(*r*) See *Lewellin v. Mackworth*, 2 Eq. Ca. Ab. 579; *Earl of Huntingdon v. Countess of Huntingdon*, 3 P. W. 310, (*n*.).

(*s*) 3 P. W. 215. There is indeed a case, *Allen v. Sayer*, 2 Vern. 368,

in which Lord Somers seems to have decided, that an infant *cestui que trust* cannot be barred by the *laches* of his trustee; but Mr. Lewin has shewn, by an elaborate examination of the case, that it did not involve any such decision. See Lewin on Trusts, p. 605, 1st ed.

(*t*) Of course an infant is not, any more than an adult, barred by lapse of time, where his trustee has aliened to a person having notice of the trust. See 1 Sch. & Lef. 379.

Where an administrator in trust for an infant has a right to sue during the infancy, and does not sue within the time prescribed by the Statute of Limitations, the infant is barred of his remedy against his debtor (u).

It bars infant's claims as between him and strangers.

If trustees appointed to protect the inheritance neglect their duty, and suffer an adverse possession of twenty years to be held, the Statute of Limitations is a bar to the cestui que trust (x).

If a trustee for infants, having the legal right to the possession and the power of dealing with their property, leaves it in the ordering and disposition of a man who becomes bankrupt, it will pass to the assignees, for such a trustee is the true owner under stat. 21 Jac. c. 19 (y).

Infant's money left by guardian in hands of bankrupt, passes to his assignees.

An infant cannot take advantage of his infancy to excuse the non-assertion of his right under an executory agreement, where an immediate assertion of his right, and performance of his part of the contract, are essential to the interest of the other party.

Where time is a bar, notwithstanding infancy.

Where there was (z) an agreement to grant a lease on the one part, and a covenant to lay out money on the other, and the tenant died, leaving an infant heir, and the intended lessor offered to execute the lease if any one would accept it on behalf of the infant, but no one came forward to do so: it was held, that the infant, after he came of age, was not entitled to a specific performance of the agreement.

Laches after the attainment of majority bars, as has been already stated, a man's claims in respect of what has been done or omitted during his infancy.

Relief may, under peculiar circumstances, be given, notwithstanding laches after full age.

Relief sometimes given, notwithstanding laches.

(u) *Wyck v. East India Com- & Lef. 607.*
pany, 3 P. W. 309.

(y) *Ex parte Dale*, Buck, 365.

(z) *Per Lord Manners*, in *Pent-*
land v. Stokes, 2 Ba. & Be. 68; see Lef. 352.

(z) *Griffin v. Griffin*, 1 Sch. &

Hovenden v. Lord Anne elry, 2 Sch.

The testamentary guardians of an infant sold some lots of his estate, in order to redeem the land tax. The purchaser paid the purchase-money to his agent, who was also the agent of the vendors; but the agent did not pay it into the Bank of England, as directed by the statute (*a*), and therefore the title was, at law, invalid and void.

The infant came of age, and afterwards accounted with the agent for the purchase-money, treating the agent as his debtor, and the land-tax continued to be paid on the whole estate: the purchaser paying the tax on that part which was in his hands. The agent not being able to make good the purchase-money to the late infant, the latter, eighteen years after he came of age, brought an ejectment. The purchaser filed a bill for an injunction, and to compel the late infant to complete his title; but the bill was dismissed, chiefly on the ground, that the purchaser's conduct shewed him to have been aware all along, that his title had not been completed (*b*).

Affirmation at full age.

It is difficult to define the acts and words, or abstinence from acts or words, which may amount to a confirmation, or affirmation, or adoption, at full age, of transactions not absolutely void, done during infancy (*c*). But it may be generally stated, that anything which distinctly indicates an intention to adhere to what has been done, will be sufficient (*d*).

Thus, in *Cecil v. Lord Salisbury* (*e*), an infant was held to be bound by an offer made by him in his answer, whereby the other side were delayed, the infant not having, immediately after his coming of age, applied to the Court to retract his offer and amend his answer.

Where a man, being nearly of age, obtained from his trustees £350 stock, part of the sum of £750, which they held

(*a*) 38 Geo. 3, c. 60, s. 96.

and Age, (I.) 8.

(*b*) *Hicks v. Morant*, 3 Yo. & J. 286; S. C. 2 Dow & Cl. 414.

(*d*) See 4 Leo. 4; *Les v. Brown*, 4 Ves. 365.

(*c*) See Bac. Abr., tit. Infancy

(*e*) 2 Vern. 224.

in trust for him; and a few months after, on coming of age, called for the remainder of the £750 stock, and received it; this was held to be a recognition of the previous transaction (g).

(g) *Cory v. Gertcken*, 2 Madd. 40.

CHAPTER XL.

OF COMPROMISE, ARBITRATION, AND ELECTION.

HITHERTO, the cases of infant plaintiffs and defendants have been separately considered, and the decrees spoken of have been decrees pronounced after argument in adverse suits. But it is frequently advantageous for suitors, whether plaintiffs or defendants, that the suit should be compromised, and a decree be taken by consent. The Court, indeed, before (a) making any decree by consent, where infants are concerned, usually refers it to a Master to inquire whether it will be for their benefit; but after such a reference, and the Master's report in the affirmative, or without any reference, if it clearly appears to be beneficial (b), a compromise will be sanctioned, and a decree pronounced by consent, whether the infant be plaintiff or defendant; and upon such terms as the circumstances of the case may require.

Decree by consent after reference to inquire whether beneficial;

without reference in clear case.

Terms of compromise.

Where, for instance, the whole fund in the cause would have been exhausted by an inquiry to which the infant was, strictly speaking, entitled; the Court made a decree, the infant not opposing, by which he received a legacy of less value than on one result of the inquiry would have been decreed to him, though there would have been no fund to answer it (c). And where a mother and executrix undertook to maintain her

(a) 1 Bro. C. C. 488.

(b) See *Wall v. Bushby*, 1 Bro. C. C. 484; *Lippiat v. Holley*, 1 Beav. 423. In the latter case the decree commenced thus: "Declare that it is for the benefit of the de-

fendant that such order should be made as follows, the plaintiff, by his counsel, consenting thereto."

(c) *Finck v. Inglis*, 3 Bro. C. C. 420.

infant children without requiring any assistance from their estate, she was allowed to carry on the testator's business during her son's minority, without rendering an account (d).

The Court acts with particular caution where the inheritance of an infant is concerned. Thus, where an infant plaintiff claimed copyhold as heir, against an adult party who claimed it under a doubtful surrender, and the latter proposed to surrender the estate to the use of himself for life, and after his death, to the use of the infant and his heirs; the Master reported on a reference, that the transaction would be for the infant's benefit; Lord Hardwicke ordered the surrender to be made, on condition that the infant should, on attaining twenty-one, confirm the life estate of the surrenderor; but the order was made "without prejudice to the plaintiff, the infant, after he should attain his age of twenty-one years." On this occasion, Lord Hardwicke observed, "There is no instance of this Court's binding the inheritance of an infant by any discretionary act of the Court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance; for that would be taking on the Court a legislative authority, doing that which is properly the subject of a private bill (e)."

Day to shew cause, in compromise of suit affecting infant's inheritance.

In the case of *Bingham v. Lord Clanmorris* (g), real property held in trust for an infant plaintiff was decreed by Lord Manners to be conveyed by the trustees, in pursuance of an arrangement which the Master had reported to be for the infant's benefit; and no day was given him to shew cause; Lord Manners intimating, rather doubtfully, an opinion, that the Master's report in favour of the arrangement rendered this unnecessary.

The accuracy of this observation, though probably not the accuracy of the decree, may be questioned; for it is conceived, What force be-

(d) *Drake v. Fortune*, 1 Moll. 229, and 2 Ves. 23; and see Belt's 201. Supplement.

(e) *Taylor v. Philips*, 1 Ves. (g) 2 Molloy, 393.

longs to decree
for compro-
mise.

that a decree giving effect to a compromise which has been sanctioned by the Court, ought to have exactly the same force as a decree pronounced after argument; and that in the case just cited, a day ought to have been given or refused, according as the infant would or would not have been entitled to it, if the suit had continued hostile to the end.

Deeds settled
by Master, to
be executed
at 21.

In another case it was, by the decree, referred to the Master to inquire, whether it would be for the benefit of infant plaintiffs to agree to a family arrangement, by which they were to be bound; and if he found that it would be beneficial to settle deeds, to be executed by them at twenty-one. No day was given. The arrangement embraced, among other things, an assignment by the infants, of all title or claim to certain real and personal property; but they had no substantial interest in the realty (*h*).

It seems that the peculiar jurisdiction of the Lord Chancellor in respect of infants (*i*), which enables him to exercise powers much more extensive than those which belong to him where adults only are concerned, (the power, for instance, of preventing the commission of crimes), induces him to take notice of the claims of infants, even though they are not before the Court (*k*), and even perhaps to make orders affecting their interests.

How far infant
can be affected
by decree (after
reference),
where not a
party to the
suit, query?

In a case before Lord Eldon which turned chiefly upon the law of partnership (*l*), certain shares and interests in iron-works were vested in executors in trust for infants, one of whom was a posthumous child, who was not a party to any cause in Court,—a circumstance which was noticed in the discussion. It was referred to the Master to inquire whether it would be for the benefit of all parties concerned, that the works should be sold, or that they should be carried on for

(*h*) *Montgomery v. Reilly*, 1 Bligh, Swanst. 375, *supra*, p. 407.
N. S. 364.

(*l*) *Crawshaw v. Mauls*, 1 Swanst.

(*i*) 2 Swanst. 413.

495.

(*k*) *Hawkins v. Luscombe*, 2

the purpose of winding up the concern. The Master reported that it would be for the benefit of the infants, and of all other parties concerned in the works, that the shares and interests vested in the executors should be sold for a specified sum to the owner of the remainder of the works, and it was ordered that the executors should be at liberty to sell accordingly. It must be mentioned that the executors had power under the will of their testator to sell if they should think fit.

When a decree by consent affecting infants has been made without a previous reference, the authority is (as in the case of an order for maintenance) the same as if it had been referred to the Master, and he had made a report that it would be for their benefit (*m*).

Decree has equal validity without reference.

An order may be obtained in a Chancery suit (*n*) to which an infant is a party, for a reference to the Master to inquire whether it would be for the benefit of the infant that the cause should be referred to the arbitration of a particular person or persons; and the award, if not in itself inequitable, to which point the Court would no doubt suffer its attention to be called, is binding on the infant, and will be enforced by the Court, as in the case of a compromise.

Reference to inquire whether beneficial that cause be referred to arbitration.

Award will be enforced.

The question, how far an infant is bound in equity by a submission to arbitration, has been involved in some perplexity by the report of a case (*o*) decided by Lord Nottingham. Matters in difference were referred by consent and order of the Court, and an award made; exceptions were taken to the award on the one side, and the other side moved that it might be decreed. The Lord Chancellor said, "If the parties without the Court refer the differences, they choose their own judges, and this Court relieveth not against the award, unless it be in a case of corruption, exceeding authority, or the like.

Discussion as to how far infant is bound in equity by submission.

Distinction between submission out of Court and in Court.

(*m*) 1 Bro. C. C. 488.

(*o*) *Cavendish v. —*, Trin.

(*n*) See *Davis v. Page*, 9 Ves. 28 Car. 2; S. C. 1 Cha. Ca. 279; 350; *Watson on Arbitration*, p. S. C. 1 Eq. Ab. 50. 54, 2nd edition.

But when there is a reference by consent and order of Court, if it appear unequitable, this Court will not decree it: and accordingly in this cause set aside the award and bond of submission. The reason was, because it concerned an infant, to whom £450 was awarded; and that bond should be given by the guardian, that the infant should at his full age convey the lands in question, which is not reasonable, for he may die; or if he live to age, refuse to convey, so it is not mutual."

"The Lord Chancellor also said, he would never decree an award which should bind an infant."

Lord Tenterden, who quoted this judgment in a modern case (*p*), laid the chief stress upon the words, "it is not mutual."

But the report of *Cavendish v.* — is very defective. We are not told which side objected to the award; whether the guardian refused to give his bond, or the opposite party considered the guardian's bond an inadequate security for the infant's performance of the award. If the guardian had been willing to give his bond, and the other party had deemed it a sufficient security, there would have been no want of mutuality. Lord Nottingham's declaration that he would never decree an award which should bind an infant, must be understood with reference to the case before him, which was that of an infant called upon to convey his real estate: and as a decree of the Court itself cannot (except in the cases provided for by statute) bind an infant to convey his real estate so as to deprive him of his day to shew cause against it,—of course the award of an arbitrator does not so bind him.

Infant not bound by award to convey real estate without day to shew cause.

That Lord Nottingham could not have intended to say without qualification, that he would never decree an award which should bind an infant, appears from a case of the very same year, cited by Lord Hardwicke in *Harvey v. Ashley* (*r*).

(*p*) *Biddell v. Dows*, 6 B. & C. (r) 3 Atk. 614.
255; S. C. 9 D. & Ry. 404.

In the case of the *Bishop of Bath and Wells v. Hippesley*, 28 Cha. 2, before Lord Nottingham, there was a submission to an award by the Bishop on one part, and the defendant, an infant, and his guardian on the other part; the award was to this effect, that, during the Bishop's life and the infant's minority, the plaintiff and defendant should be at liberty, promiscuously, to dig lead ore in certain ground, and that the profits should be divided equally between them: a bill was brought to confirm the award, and the Court, being of opinion that the infant was bound by it, indemnified the trustees for what they had done, and decreed according to the prayer of the bill, that the award should be established.

Award supported, where beneficial to infant.

Here the reference had been made without the sanction of the Court. But one of the parties being an infant, and therefore incapable of choosing his own judge, Lord Nottingham's observations as to references made out of Court, do not apply; and he must have acted solely with a view to the infant's benefit, by which alone such transactions are to be tested.

At law an infant cannot be bound by a submission to arbitration. Whether his submission is void or only voidable, is a question on which the authorities are at variance (t).

Infant is not bound by submission to arbitration.

But an award made where an infant is a party to the submission, is not at law, at all events during the infancy, binding either on the infant or on any other party to the submission. And an award made upon such a submission, directed by a Court of Equity, cannot be enforced at law, at least where the order for the reference to arbitration proceeds upon the consent of the attorneys of the parties in the suit (u), for in

If adult binds

(t) See 1 Selwyn, N. P. 129, 10th ed.; Watson on Arbitration, p. 53, 2nd ed.; Bro. Arbitr. pl. 43; 10 H. 6. 14; Fitzh. Arbitr. pl. 4; Rolle, Arbitr. p. 268, (A.), 1, 2; Ibid. Infant, (D.) 5; Vin. Arbitr. (A. a.); Rudston v. Yates, March, 112, 141; Sir W. Jones, 164; Latch, 207; Noy, 93; Gill v. Russell, Freeman. 52, 139; Douse v. Coze, 3 Bing. 20; S. C. 10 J. B. Moore, 272; Biddell v. Douse, 6 B. & C. 255; S. C. 9 D. & Ry. 404. (u) Biddell v. Douse, ubi supra.

himself for infant, the award is good.

such a case there is no mutuality. But if the next friend of the infant, or his guardian, or any other person chooses to submit, to be personally bound for the infant's acquiescence under and performance of the award, and to be responsible if he should refuse to comply with it when he comes of age, this gives mutuality to the contract, and all persons submitting are bound by the award (x).

How far a submission on the part of an infant is regarded.

Submissions on the part of infants, though not binding on them, are not discouraged nor treated as null, even in Courts of law.

Notice given to him.

Where a cause, in which an infant by his next friend was plaintiff, was referred by parol agreement, it was held that the infant should have notice of the award, (which was for the payment of costs), and should be asked whether he would abide by it or not; and that if he refused to do so, the defendant might carry down the record, and proceed to trial by proviso (y).

An award made against trustees and guardians of an infant, who was tenant for life of real estate, but died before the award was made, is not binding upon the trustees (z).

Of course an infant remainder-man is not bound, at law or in equity, by the submission, out of Court, of the tenant for life (a).

Court will, if necessary, elect for infant.

Where a case of election arises, either under a will or under a deed, and the party who ought to elect is an infant; the practice is to refer it to the Master to inquire what will be most for the infant's benefit, and the election will be made for him accordingly, (the Court merely supplying that discretion in the choice, which by reason of his infancy he is supposed

(x) *Biddell v. Dowse*, *ubi supra*; (y) *Godfrey v. Wade*, 6 J. B. Roberts v. Newbold, Comb. 318; Moore, 488.
Bouyer v. Blockridge, 3 Lev. 17; (z) *Bristow v. Binns*, 3 D. & R. 184.
Gill v. Russell, *ubi supra*; see *Bacon v. Dubarry*, 1 Lord Raym. 246; (a) *Singleton v. Singleton*, 2 Burrell v. Jones, 3 B. & Ald. 47. Molloy, 520.

to want), and will be binding upon him, both as to real and as to personal estate (b). But he cannot be declared a trustee of real estate which it has been reported to be for his benefit to resign, nor be ordered to convey it under stat. 1 Will. 4, c. 60, for cases arising out of the doctrine of election in equity are excluded by the 18th section from the operation of the statute. The conveyance must, therefore, be postponed till the infant attains twenty-one, and consequently he must have a day to shew cause.

He cannot be ordered to convey under stat. 1 Will. 4, c. 60.

Day to shew cause.

(b) *Chetwynd v. Fleetwood*, 1 Bro. P. C., ed. Toml., 300; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Rushout v. Rushout*, 6 Bro. P. C., ed. Toml., 89, cited in *Moore v. Butler*, 2 Sch. & Lef. 267; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Bigland v. Huddleston*, 3 Bro. C. C. 286, n.; 2 Fonbl. Eq. 323, n.; *Gretton v. Haward*, 1 Swanst. 409; *Hume v. Rundell*, 2 S. & S. 174, *supra*, p. 257; *Ebrington v. Ebrington*, 5 Madd. 117; *Reynolds v. Torin*, 1 Russ. 129; *Simson v. Jones*, 2 R. & Myl. 374, 377. See Mr. Swan-

ston's note to *Gretton v. Haward*, (1 Swanst. 413), where some old cases of a contrary tendency are commented upon. The same learned writer (*Ibid.* 416, n.) suggests that in the case of infancy it would not be unreasonable, considering that preference may be determined by circumstances independent on pecuniary value, to distinguish between cases where the interests of third persons require an immediate, and where they admit a suspended election.

CHAPTER XLI.

OF VARIOUS MATTERS RELATING TO INFANTS.

THE foregoing chapters refer chiefly to cases where the interests of infants are in conflict with those of other persons. But as the forms of litigation are every day assumed, where there is no real dispute, merely for the purpose of obtaining for infants the protection of the Court, it may be convenient to state, by way of supplement to the information already given under various heads, certain rules adopted by the Courts for the benefit of infants, whether plaintiffs, defendants, or brought incidentally into view without being parties to any cause, and also certain particulars which have not been mentioned elsewhere.

Guardian for
infant plaintiff
before appear-
ance of defend-
ants.

A guardian may be appointed for an infant plaintiff before the defendants have appeared; for, if a guardian is not to be appointed till the defendants have appeared, the infant may be left for many months without any one to take care of his person, or to see to his education (*a*). And in a case where the bill was filed on behalf of infant plaintiffs against the executors of their father's will, for an account, &c., a reference was made for a guardian and maintenance, before answer (though after appearance) of the defendants (*b*).

Maintenance
before answer.

Title of peti-
tion for guar-
dian and
maintenance.

A petition for a guardian and maintenance, where there is no suit, must be intitled, "In the matter of A. B. an infant (*c*);" and if it be presented to the Lord Chancellor, it must (*d*), in common with all notices of motion not in any cause, and all petitions not in any cause, which are presented

(*a*) *Pendleton v. Mackrory*, Dick. 736.

(*c*) 3 Dan. C. P. 265.

(*d*) See the 6th Order of 11 Nov.

(*b*) *Mortimer v. West*, Reg. Lib. 1841.
1817, B., fol. 76.

to the Lord Chancellor, be marked with the title of one of the Vice-Chancellors, and thenceforth be attached to such Vice-Chancellor's Court, unless removed therefrom by any special order of the Lord Chancellor.

The statutes enabling guardians to act for infants, do not specify the kinds of guardianship to which they extend (*e*); yet persons acting under any of those statutes, must be real (*g*) guardians and not volunteers. It happens also, sometimes, that a power of leasing is given by will or deed to the guardians of children who have no guardians; and the standing orders of the House of Lords, relating to private bills, require the consent, by guardian, of infants whose interests are affected.

What guardians are competent to act for infants under statutes, powers, and standing orders.

That testamentary guardians and guardians in socage may act in such circumstances, there can, it is conceived, be no doubt, and probably also where the infant has socage lands, but has passed the age of wardship in socage, a guardian appointed by him may act; or the father, if he be alive (*h*); but in all other cases it is extremely desirable to have a guardian appointed by the Court of Chancery. The Court will, if desired, appoint, even without a reference, a guardian of the infant's person and estate for the single purpose of consenting, contracting, or performing the act required; and where an appointment of this kind is made, no recognisance is required from the guardian (*i*).

Guardian appointed by court for special purpose;

no recognisance required.

A man may act as an infant's solicitor and next friend in the same suit (*j*).

Solicitor may be next friend.

A husband and wife having lived apart under articles of separation, a reconciliation took place; upon which occasion an instrument was executed by them and two trustees, providing that the wife might, at any future time, with the as-

Effect of stipulations as to children in articles of separation.

(*e*) *Supra*, pp. 289, 296, and 1841, A., fol. 822; see Appendix, chap. 27. p. xvii.

(*g*) *Ware v. Polhill*, *supra*, p. 288. (*j*) *Lundin v. Darvill*, Rolls, 22

(*h*) See *In re Naish*, *supra*, p. 218. March, 1842; Reg. Lib. 1841, B.,

(*i*) *Ex parte Courtenay*, Reg. Lib. fol. 614; see Appendix, p. xvii.

sent of the trustees, separate from her husband, and take away the children; and upon such separation, reviving the provisions of the former articles. After a second separation, a bill was filed to have these instruments delivered up; and in the course of the discussion relating to the suit (which was eventually compromised) Lord Eldon made the following observations:—"The father has control over the children by the law; as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and, in this instance, the control as to the children is between the husband and wife only), it deserves great consideration, before a Court of Law should, by *habeas corpus*, upon a *unilateral* covenant, as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them, against his will, in the hands of his wife (*k*)."

Lord Eldon acted upon these principles in the case of the Earl of Westmeath (*l*). It is to be observed, that neither of the deeds relied on in that case contained any covenant for indemnifying the husband against the wife's debts; that the first deed was made to provide for a future separation; and that there had been cohabitation subsequently to the second deed (*m*).

Nature of the office of curator of infants, living the father.

Lord Eldon's opinion cited above (*n*), that there cannot be a guardian of children whose father is alive, was also the opinion of Lord Chancellor Hart, who said, that any other person whom it becomes necessary to appoint, is not the guardian, but rather a curator, to take care of the children, to protect them against some prejudice during the father's life (*o*).

Testamentary guardian may plead the special matter upon

If an infant sues out a writ *de homine replegiando* against his testamentary guardian, the latter may plead the special matter to the writ, and defend himself at law. But unless

(*k*) *Lord St. John v. Lady St. John*, 11 Ves. 526; see p. 531.

(*l*) *Supra*, p. 155.

(*m*) Jac. 126.

(*n*) Page 144; see p. 149.

(*o*) 1 Moll. 210.

there is a suit in the Court of Chancery relating to the infant, the guardian cannot obtain an order of that Court to supersede the writ (*p*). writ de hom. repleg.

There ought always to be a reference to the Master, where there is a dispute as to who shall be invested by the Court with the guardianship of a child (*q*). There must be a scheme where dispute as to guardianship, or guardians disagree.

A reference to the Master, to approve of a scheme of education, cannot be dispensed with, when guardians do not agree as to the management of their wards (*r*).

The mother of illegitimate children is frequently appointed their guardian.

It is said (*s*) to be questionable, whether the Irish Statute, 33 Geo. 3, c. 21, s. 1, has not placed Popish Ecclesiastics upon the same footing with Protestant Ecclesiastics, with respect to guardianship; and enabled Papists, &c., whether ecclesiastical or lay, to be guardians to the children of Protestants, as well as of Roman Catholics. Question as to Roman Catholic guardianship in Ireland.

A Roman Catholic father having by his will appointed guardians of his own faith for his children, and enjoined them to educate the children as Roman Catholics, and his only child having been allowed to remain chiefly with Protestant relations up to the age of fifteen, when it was proposed to place him at school with a clergyman of the church of England,—the surviving testamentary guardian, who had never acted before, objected to this course; and a petition was presented, praying a reference for maintenance and to settle a scheme for the infant's education. Vice-Chancellor Knight Bruce, in accordance with the principles laid down in *Lyons v. Blenkin* (*t*), though he was strongly of opinion that the infant ought to have been brought up as a Roman Catholic, considered that great danger to the spiritual welfare and to the moral character of Religious education of infant of fifteen, not changed unless he wishes it.

(*p*) *Treblecock's case*, 1 Atk. 633; see p. 37, n. (*l*), *supra*. (*r*) *Campbell v. Mackay*, 2 M. & C. 34.

(*q*) *Beattie v. Johnstone*, 19 Law Journ. 300. (*s*) 1 Gabbett's Digest, 420. (*t*) *Jac.* 245; *supra*, pp. 136, 138.

Reference to inquire who is the legal guardian.

the infant might arise from a change of religious education, and intimated that he would consult the wishes of the infant as to his future religious education. The testamentary guardian not having acted before, his Honor held it to be necessary that a reference should be directed to ascertain who was the legal guardian of the infant (*u*).

It has of late become not unusual to insert in the order of reference for a guardian a direction to inquire whether the infant has any legal guardian.

Erroneous order for maintenance does not bind the fund, and may be stopped prospectively.

The existence of an erroneous order as to the maintenance of an infant party, whether plaintiff or defendant, does not prevent the Court from making an order inconsistent with the first, as to the principal fund. The payment of maintenance, under such erroneous order, would be stopped prospectively; but the order would not be discharged, so as to make trustees liable for the payments they have made under it (*x*).

Allowance for education of brother, Court requires information.

If the allowance for an infant's maintenance be increased (*y*), in order to meet the expense of educating a brother or sister, the Court requires to be minutely informed as to the plan of education which is adopted (*z*).

Husband, having married infant plaintiff without leave, must answer for his contempt before he can proceed in revived suit.

An infant plaintiff, a ward of the Court, having married without leave, her husband filed a bill in her name and his own to revive the suit which had thus become abated; but on its being shewn to the Court that the wife was under age, and the husband out of the jurisdiction, all proceedings in the bill of revivor were stayed till the husband should appear and answer for his contempt in marrying the ward (*a*).

Proceedings where a man who has committed contempt is al-

A man was ordered to stand committed for marrying a ward of the Court without permission; a warrant was made out to apprehend him, but he could not be found; afterwards

(*u*) *Witty v. Marshall*, 1 You. & C. N. C. 68.

(*x*) *Campbell v. Campbell*, L. C., 18th Nov. 1840.

(*z*) *Saunders v. Vautier*, 1 Cr. & Ph. 240.

(*a*) *Brummell v. Macpherson*, 7 Ves. 237; Reg. Lib. 1801, A., fol.

(*y*) *Supra*, p. 250.

546; see 4 Sim. 284.

it was discovered that he was a prisoner in the Marshalsea for debt; his contempt being criminal, not of a civil nature, he could not be charged in custody, especially as the Court of Chancery had no jurisdiction over the Marshalsea. After consideration, Lord Hardwicke, C., ordered an *habeas corpus cum causis* to issue, directed to the Marshal of the Marshalsea, or his deputy there, to bring his prisoner to the bar of the Court of Chancery to answer his contempt (b).

ready in custody of another Court.

Though all persons promoting the marriage of a ward of Court without leave have been treated as guilty of contempt, the ward is considered as passive, and it does not appear that any punishment has ever been inflicted on him or her for disobedience.

Ward not punished for contempt.

A marriage (c) was pronounced null on the ground of force and custody, having been celebrated between a girl aged only twelve years and a half, and one of her testamentary guardians, who had taken her from school and carried her abroad for the purpose without any constraint.

Marriage of infant of tender years to her guardian annulled for force and custody.

It appears that they had gone abroad in violation of an order of the Lord Chancellor as well as without the consent of the other guardians (d), and hence it may reasonably be inferred, that the suit for nullity of marriage was not instituted without the approbation of the Court of Chancery. The reports do not, it is believed, contain any other case in which such a suit has been sanctioned by the Court on behalf of a female ward.

Suit for nullity of marriage of female ward of Court.

Where a ward of Court had been sent by his mother to a milder climate, under the urgent advice of medical men, and without any intention of violating the rules of the Court; the Court acted as it would have done if the infant had been removed by permission (e).

Where removal of ward of Court will be excused.

A person entitled at 21 to a fund in Court, having attained

Fund not kept

(b) *Brandon v. Knight*, Dick. 160. (d) Page 428.
(c) *Wyndham v. Lord Ennis-*
(c) *Harford v. Morris*, 2 Hagg. Cons. Rep. 423. *more*, 1 Keen, 467; see p. 129, *supra*.

in Court, for party of full age.

that age, petitioned to receive a dividend only, wishing the money to continue in the name of the accountant-general; but Lord Thurlow refused to make such an order, and ordered him to take the money (*g*).

Facts must be fully stated in taking infants' money out of Court at 21.

It is the duty of all persons applying to the Court on behalf of infants, or on behalf of persons instantly upon their ceasing to be infants, and not fully informed of their rights, or of the nature and purpose of the application made in their behalf, correctly to represent to the Court all material circumstances concerning the interest of those on whose behalf the application is made.

Persons obtaining it unduly, ordered to replace it.

Where money belonging to an infant ward has been obtained out of Court, the Court being misled either by the suppression of the fact of infancy, or by the assertion that the ward is of age, the persons who have misled the Court, and those who have profited by the deception, will be ordered, upon petition in the same cause, to replace the sum so obtained, and also (if the justice of the case requires it) the amount which might have been produced by the interest or dividends since it was drawn out (*h*).

Husband must not receive fortune of ward without a settlement.

It is the uniform and undeviating practice of the Court not to permit the husband of an infant ward to take her fortune, without seeing that he has made a proper settlement on her and her issue. The consent of the father does not make an exception to the rule, though it might protect the husband from the penal consequences of a contempt of the Court, in marrying its ward (*i*).

What property may be settled.

The settlement may either be of the wife's fortune, or of some proper equivalent; and if it is a settlement of the husband's estate, the Master will require evidence of the sufficiency of the title and of the nature of the estate (*k*).

If a ward of Court comes of age and marries, and there is

(*g*) *Isaac v. Gompertz*, 1 Ves. Ibid. jun. 44.

(*i*) See *Milner v. Colmer*, 2 P.

(*h*) *Barrington v. Grogan*, Beatt. W. 639.

199; *Bowes v. Strathmore*, cited (*k*) Beatt. 215.

in fact a settlement executed, the Court will not inquire into the providence or improvidence of the settlement (*l*).

But although a wife being adult, may in ordinary cases come in and desire her fortune to be paid over to her husband if no settlement has been made,—yet if a fraudulent settlement was made she cannot do so, and the whole disposal must remain with the Court (*m*).

Where fraudulent settlement, wife though adult is treated as infant.

Where the parties do not agree to such a settlement as the Master approves, they cannot elude the jurisdiction by merely waiting till the determination of the minority; for if a settlement is made after full age, in completion of a treaty entered into during minority without the sanction of the Court, the Court will not part with the property of its late ward, but will refer it to the Master to consider the settlement made, and, if necessary, to have a new settlement executed (*n*).

Where there have been proceedings in Court with a view to marriage, the Court will not give up the fortune, except upon a settlement approved by it,

So where a person about to contract marriage, applies to the Lord Chancellor under the Marriage Act (*o*) for his consent, and upon a reference to the Master to say whether it is a proper marriage, the intended husband carries into the office a state of facts supported by affidavit, in which he states that he has agreed to make a certain settlement if the marriage takes place. This proposal, it seems (*p*), is binding upon him under the Statute of Frauds, even if the marriage afterwards takes place by banns, and not under the authority of the Lord Chancellor (*q*).

and husband bound by his proposal for settlement before the Master.

(*l*) Beatt. 214.

(*m*) *Barrington v. Grogan*, 2 Moll. 249.

(*n*) *In re Donne*, 2 Moll. 490, and note.

(*o*) 6 Geo. 4, c. 76, s. 17.

(*p*) Per Vice-Chancellor Wi-gram, *Cooks v. Fryer*, 6 Jur. 479.

(*q*) In the case of *Stubbs v. Sar- gon*, (2 Beav. 496, reported since the publication of the first part of

this treatise), Lord Langdale, M.R., declined to follow the case of *Gullin v. Gullin*, (7 Sim. 236), in taking the consent of a married woman, who was a minor, to the payment out of court of money to which she was entitled; and in *Abraham v. Newcombe*, (6 Jurist, 433), Sir L. Shadwell, V. C., said, that it was clear that some circumstance of importance had been omitted

Consent of guardians under Marriage Act invalid where father alive.

The marriage of a minor by license derives no validity from the consent of guardians appointed for the purpose by the Lord Chancellor, if the minor's legal father is living at the time (*r*): and such a marriage was held void under Lord Hardwicke's act, though the parties did not know till afterwards that the father was alive (*s*).

Commission of lunacy against infant;—reference whether beneficial.

It is to be gathered from the language of Lord Eldon in the case of *Sherwood v. Sanderson* (*t*), that on one occasion, where a young lady, at the age of seventeen or eighteen, had been married by an adventurer for the sake of her fortune, the Lord Chancellor in the *Court of Chancery* directed an inquiry whether she was of sound mind when married, and whether it would be for her benefit that a commission of lunacy should issue; and ordered all the expence of those inquiries to be paid.

Where granted.

A commission of lunacy may issue against an infant. The power which the Court exercises over the persons and estates of its wards, generally renders such a proceeding unnecessary during infancy; but if the infant is nearly of full age, and there is no prospect of his ever being of sound mind (*u*); or if any circumstance renders it desirable, such as an attempt to marry the lunatic; a commission will be granted, and all necessary directions given: thus, in one case, Lord Hardwicke, in issuing the commission, made an order that the infant should not be married without leave of the Court (*x*).

No person whatever may profit by influence over minors.

The principle, that parents and guardians must not derive any profit from their influence over young persons, applies

in the report of *Gullin v. Gullin*, and that he considered it quite plain that a feme covert infant could not consent to the payment of money out of court to her husband. The case of *Gullin v. Gullin* is stated from Reg. Lib. *supra*, p. 204, n.; see 3 Atk. 712.

(*r*) *Supra*, chap. 17.

(*s*) *Boughton v. Boughton*, Sir H. Nicolas on Ad. Bast. 178.

(*t*) 19 Ves. 289.

(*u*) *In re Flint*, 18th Aug. 1831, Shelf. Lun. 91.

(*x*) *Halse's case*, cited 2 Ves. 403; Shelf. Lun. 90, n.

equally to servants, and all persons who have an opportunity of acquiring an ascendancy, which has often been perverted to the purpose of what is called marriage brocage (*y*).

Marriage
brocage.

So, all advantages obtained by parents or guardians from infants who have lately come of age, are in general regarded with jealousy, and readily set aside (*z*), although they may sometimes proceed upon good and sufficient reasons, to which the Court will allow due weight (*a*).

Advantages ob-
tained by pa-
rents and
guardians
viewed with
jealousy.

Even where accounts have been settled and the connexion between the parties terminated, transactions appearing to have grown out of the influence arising from the relation, will be set aside (*b*); as will, on the other hand, any transactions by which a person standing in no fiduciary relation obtains an undue advantage from a person who has just come of age (*c*).

Protection
after infancy
has ceased.

Undue advan-
tage taken by
a stranger.

As infants are not well qualified for the performance of trusts, it is difficult to consider an infant as intended to be a trustee, and the tendency has rather been to interpret all gifts to an infant as favourably to him as possible.

Gifts to infant
interpreted
favourably.

Thus the presumption arising from other circumstances, that the executors of a certain will were not meant to be mere trustees, was "strengthened" in Lord Hardwicke's mind by their both being infants (*d*).

But if it appears distinctly from the circumstances, that a gift has not been conferred upon the donee for his own benefit, as where upon the construction of a will, a person is plainly a trustee (*e*); or where one person takes a purchase in the name of another, and receives the profits himself (*g*); it will

- (*y*) *Supra*, p. 264; *Goldsmith v. Turn. & R.* 12.
Bruning, 1 Eq. Ab. 89; *Osborne v. (b)* See *Wright v. Proud*, 13
Chapman, 1 Cha. Ca. 157; *Cole Ves.* 137.
v. Gibson, 1 Ves. 503. (*c*) *Say v. Berwick*, 1 V. & B.
(*s*) *Cocking v. Pratt*, 1 Ves. 400; 195.
Carpenter v. Heriot, 1 Ed. 338; (*d*) *Blinkhorn v. Feast*, 2 Ves. 30.
Beasley v. Magrath, 2 Sch. & Lef. (*e*) *King v. Denison*, 1 V. & B.
31; *Griffin v. De Veuille*, 3 Woodd. 280; see p. 275.
App. 16; 3 P. W. 131, n., ed. Cox. (*g*) *Grey v. Grey*, 2 Swanst. 600.

not be held that there can be no trust, on the ground that the person in question is an infant. The infant will be deemed, so far as regards the rights of property, a trustee, though he cannot act in the execution of the trust.

Advancement
of infant child
by parent.

Where, however, a father purchases land in the name of an infant child, either alone or jointly with another person, and receives the profits, and makes leases; this is no evidence of a trust in the infant for his father; but the land will belong to the infant, and the father cannot devise it away from him (*h*). This distinction in favour of an infant child has been accounted for by saying, that the father having "colour" to receive the profits as guardian, is to be understood as having received them in that capacity; but Lord Nottingham referred it to the presumptive advancement of the child by the father (*i*).

Survivorship of
orphan's share
by custom of
London.

It appears by the certificate of the lord mayor and aldermen of London, prepared in obedience to an order of the Vice-Chancellor of England, in the cause of *Bruce v. Knott*, 9 Feb., 1842, that by the custom of the city, when there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant, survives among the other children in case of the death of the party to whom it has come under the age of twenty-one years; and that if there be an accumulation of interest upon an orphanage share, the accumulation survives in the same manner as the original orphanage share.

Taking girl
by fraud from
parents, is
abduction.

It seems (*j*), that where a man by false and fraudulent representations, induces the parents of a girl under sixteen years of age to allow him to take her away, this is an abduction of the girl, within stat. 9 Geo. 4, c. 31, s. 20 (*k*).

(*h*) *Grey v. Grey*, 2 Swanst. 600; 480; see *Loyd v. Read*, 1 P. W. 607. S. C. Finch, 338; S. C. 1 Cha. Ca. (*i*) *Grey v. Grey*, 2 Swanst. 600; 296; *Mumma v. Mumma*, 2 Vern. and see 1 P. W. 608.
19; *Lamplugh v. Lamplugh*, 1 P. (*j*) *Reg. v. Hopkins*, 1 Carr. & W. 111; *Taylor v. Taylor*, 1 Atk. M. 254.
286; *Stileman v. Ashdown*, 2 Atk. (*k*) *Supra*, p. 81.

The stat. 10 Geo. 4, c. 34, s. 22, which makes forcible abduction a capital offence in Ireland (*1*), has been modified by stat. 5 Vict. sess. 2, c. 28, s. 15, which makes the principal in the first degree liable to be transported for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

Punishment of forcible abduction in Ireland.

By s. 17, he may be imprisoned for not more than four years, nor less than one, before transportation; and by s. 18, principals in the second degree, or accessories before the fact, are made punishable like the principal in the first degree. As to accessories after the fact, no alteration has been made in the law.

(1) *Supra*, p. 183.

**Descent to
posthumous
child ; heir
retains mesne
profits.**

**Posthumous
child takes in
remainder : is
entitled to
mesne profits.**

**Executory
devise to infant
in ventre sa
mere, is good.**

Such infant is considered as born.

(a) 2 Bl. Comm. 169; *Basset v. Basset*, 3 Atk. 202; *Goodtitle v. Newman*, 3 Wils. 526; Hargr. Co. Litt. 11. b., n. (4).
(b) See the preceding note.

as born. There was formerly some difference of opinion on this point; and in some of the early cases, it was laid down, that he might be a devisee, or legatee (*g*); while in others, it was held, that he was incapable of taking under a bequest to children, relations, or descendants, living at the death of the testator (*h*). But in a case in which a man devised certain premises to his brother H. C. for life, and after his death, to the use of all and every such child or children of his said brother, as should be living at the time of his decease; and the question was, whether one of the children, who was in *ventre sa mere* at the time of the brother's death, should take a share or be excluded: Lord Thurlow, who seems himself clearly to have thought the child within the intention of the testator (*i*), sent the case, in consequence of some of the above-mentioned decisions, to a court of law. The Judges there were unanimously of opinion, that the after-born child came within the description of children living at the time of the decease of H. C. (*k*). And this case has not only been followed (*l*), but it has even been held, that such a child shall be considered as in existence, to his disadvantage (*m*). So, in a late case of a legacy in trust for all the children of the nephew of a testatrix, "*born in her lifetime*," a child born a few months after her death, was held to come within the description; being equally within the reason and motive of the gift, as in a bequest to children *living* at a testator's death (*n*).

Even to his disadvantage.

Takes legacy to children born.

- (*g*) See Com. Dig., Est., by Dev. 320; S. C., 2 Ves. jun. 673.
 (1) ; Swinb. p. 4, s. 15; *Stanley v. Baker*, Sir F. Moo. 220; *Northey v. Strange*, 1 P. W. 340.
 (*h*) *Musgrave v. Parry*, 2 Vern. 710; *Web v. Web*, cited 1 Ves. 112; *Bennett v. Honywood*, Ambl. 708; *Pierson v. Garnet*, 2 Bro. C.C. 38; *Cooper v. Forbes*, Id. 63; *Freemantle v. Freemantle*, 1 Cox, 248.
 (*i*) *Clarke v. Blake*, 2 Bro. C.C. 320; S. C., 2 Ves. jun. 673.
 (*k*) *Doe v. Clarke*, 2 H. Bl. 399.
 (*l*) *Rawlins v. Rawlins*, 2 Cox, 425; *Whitelock v. Heddon*, 1 Bos. & Pull. 243.
 (*m*) See *Thellusson v. Woodford*, 4 Ves. 227; 11 Ves. 112; and 2 Ves. & B. 369.
 (*n*) *Trower v. Butts*, 1 Sim. & St. 181.

Consequences
of there being
several posthu-
mous children.

It is said that if a legacy be given to a child in *ventre sa mere*, and the woman is delivered of two or three children, the legacy is to be divided among them: but if the gift were to "any" child she might bring forth, that each child might claim a legacy to the specified amount. The case also is put of a testator willing that if the child be a son he should have two parts of the residue, and the mother one; but, if a daughter, that the mother should have two parts and the daughter only one; and it is said that if the mother be delivered of both a son and a daughter, they shall all take in proportion; the son twice as much as the mother, and the mother twice as much as the daughter (*o*).

Child in *ventre
sa mere* may
be appointed
executor.

A child in *ventre sa mere* may be appointed executor, and if the mother bring forth two or three children at that one birth, they are all to be admitted executors (*p*).

Takes under
Statute of Dis-
tributions;

A posthumous child may take under the Statute of Distributions as living at the death of the testator (*q*). He comes in for his share by the custom of London, along with the other children (*r*). He is within a provision in marriage articles for such children of the marriage as shall be living at the time of the decease of the father and mother (*s*), or a power to appoint to children living at the parent's decease (*t*).

is within power
of appoint-
ment.

Copyhold may
be surrendered
to his use.

A man may surrender copyhold lands immediately to the use of an infant in *ventre sa mere*; for a surrender is a thing executory, and nothing vests before admittance (*u*).

He is a life
in being for the
purpose of

An infant in *ventre sa mere* is a life in being for the purpose of preventing the alienation of property, and any limitation

(*o*) Swinb. p. 4, s. 20.

153.

(*p*) Godolph. part 2, c. 9, s. 1.

(*s*) *Millar v. Turner*, 1 Ves. 86.

(*q*) *Wallis v. Hodson*, 2 Atk.

(*t*) *Beale v. Beale*, 1 P. W. 244;

117; *Burnet v. Mann*, 1 Ves.

156; *Ball v. Smith*, 2 Freem. 230;

see 4 Ves. 322; 2 Sugd. Pow. 285, 6th ed.

Edwards v. Freeman, 2 P. W. 446;

Toller, 374.

(*u*) Gilb. Ten. 264; Bac. Abr., tit. Infancy and Age, (C). As to

(*r*) *Walsam v. Skinner*, Prec.

usurpation, see Hob. 240.

Cha. 499; S. C. Gilb. Eq. Rep.

may be made by way of executory devise, &c., provided the same is to take effect within a life or lives in being, including, among those lives, children then in *ventre sa mere*, and twenty-one years beyond the death of such life or lives and the time of gestation, so as to allow for the birth of a child in *ventre sa mere*, that is to say, the time of gestation may be taken both at the beginning and at the end (v).

preventing alienation.

Two periods of gestation allowed.

A bill may be brought by *prochein amy*, as has been already stated (x), on behalf of an infant in *ventre sa mere*, and the Court has granted an injunction in his favour, to restrain the heir, to whom the land descended in the meantime, from committing waste. It is said, that the mother may detain charters on behalf of such an infant (y).

Bill may be filed on his behalf.

Injunction to stay waste.

He might have been vouched in a recovery, though it was for the purpose of making him answer in value.

A father may appoint a guardian under 12 Car 2, c. 24, for an infant in *ventre sa mere* (z), but it seems that the spiritual courts cannot appoint a guardian in such a case (a).

Guardian may be appointed for him.

The destruction of such a child is murder (b).

We read in Co. Litt. (c), that "if the daughter, the son being in *ventre sa mere*, be forejudged, it shall bind the son that is born afterwards, because he had no right at the time of the forejudgment." In accordance with this principle, the courts of equity hold that, if a decree is made in a cause, and then an infant is born, who if born before the decree would have been a necessary party to the suit, and would have had a day given to shew cause against the decree, such an infant shall be bound by the decree.

Infant in *ventre sa mere* bound by decree;

If an infant be born during the progress of a cause, he is bound by all the proceedings up to the time of his birth.

and by proceedings up to the time of his birth.

(v) 11 Ves. 149; see Fearn, C. R. 538, n., 9th ed.

(x) *Supra*, p. 364.

(y) 2 Vern. 710.

(z) Sect. 8; see 4 Ves. 322.

(a) *Walker v. Carless, supra*, p. 75; but see Swinh. p. 3, s. 11.

(b) 3 Inst. 50; 1 Ves. 86.

(c) 100. b.; see 245. b.

Writ *de ventre inspiciendo* ;

Lies for heir presumptive ; its effect.

Lies for tenant in tail, or devisee.

Granted on petition. Granted to legatee.

Granted against woman whose husband was alive.

Not granted in lifetime of ancestor.

Granted where widow marries.

There is an ancient proceeding at common law where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate. In this case the heir presumptive may have a writ *de ventre inspiciendo*, to examine, by a jury of matrons, whether she be with child or not, and if the jury find her with child, then she is to be removed by a second writ, issuing out of the Court of Common Pleas, (where the first is returnable), to a castle where the sheriff is to keep her safely till delivered ; but if the widow be, upon due examination, found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child in due time (*d*).

This writ is of common right, and it may be had by a person who is entitled only to an estate tail (*e*), or by a devisee (*g*). It ought to be applied for upon petition (*h*). A proceeding analogous to this writ has been decreed upon a bill in equity, where a sum of money was devised to a charity on the death of A. without issue, A. dying and leaving a widow of ill fame, who pretended to be with child (*i*). It has been granted against a woman (whose husband was alive, but had been near ten years abroad) on the application of a devisee ; there being a limitation in the will, that if she had a male child within forty weeks after the decease of the testator (with whom she had an illicit connexion) it should take previous to the devisee (*k*).

But an heir presumptive cannot have the writ in the lifetime of his ancestor (*l*), because he is not *verus hæres* ; and on account of the hardship of separating husband and wife ; if, however, the wife marries again soon after the death of her first

(*d*) Co. Litt. 8. b. ; 1 Bl. Comm. 456 ; Cro. Jac. 685, 686 ; 2 P. W. 594.

(*e*) *Ex parte Aiscough*, 2 P. W. 591 ; S. C. Mos. 391.

(*g*) *Ex parte Bellett*, 1 Cox, 297.

(*h*) *Ibid*.

(*i*) *Attorney-General v. La Roche*, cited 2 P. W. 591.

(*k*) *In re Brown, ex parte Wollop*, 4 Bro. C. C. 90 ; S. C. 2 Dick. 767.

(*l*) Co. Litt. 8. b. ; 6 Ves. 260.

husband, and feigns herself with child by him, the heir &c. may have this writ, for the taking of the second husband being her own act, cannot bar the heir of his right once vested in him; and therefore, neither she nor her husband can complain of any hardship in the separation (*l*).

The severity of this proceeding was however relaxed, even in the reign of James I., where the widow was married again. Instead of ordering her into the sheriff's custody, and to be kept by him till delivered of the child, as the practice is, if the party is a widow, the Court permitted the wife to remain with her husband, on his entering into a recognizance, that she should not remove from the house they then inhabited, that some of the women returned by the sheriff should see her every day, and that three or more of them should be present at her delivery (*m*).

Severity of the execution relaxed.

And care has been taken in more modern cases to "accommodate the terms of the order to humanity," (in the language of Lord Kenyon (*n*)), as far as can prudently be done.

In *ex parte Aiscough* (*o*), a widow being admitted to be with child, the Court fixed on a place, agreeable to both parties, where she should be till delivered, and where the heir might, from time to time, at proper seasons and on notice, send women to see her, and to be present when the child was born. In *Ex parte Wallop*, the order was (*p*), that the writ should lie in the office for a certain time, and if within that time the woman chose to submit to an examination by two midwives, to be appointed by the petitioner, then the writ not to go till further order; otherwise the writ to issue.

A bastard, says Lord Coke, cannot take but after he hath gained a name by reputation; he can take no remainder

When bastard may take.

(*l*) Co. Litt. 8, b.; 6 Ves. 260. (*o*) 2 P. W. 591; Mos. 391.

(*m*) *Theaker's case*, Cro. Jac. (*p*) 4 Bro. C. C. 99; see S. C., 685; Harg. Co. Litt. 8, b., n. (1). Dick. 767.

(*n*) 1 Cox, 300.

Where legacy
given to natural
child of a par-
ticular woman ;

but not where
the gift is to
the natural
child of A,
if the pater-
nity be a con-
dition prece-
dent.

limited before he be born (*q*). This doctrine proceeds upon the ground of uncertainty in the person of the intended legatee, in the case of a bequest to an unborn natural child, described solely as the child of the testator; and it is therefore become an established rule of construction in such cases, that the person of the legatee must be certainly described, or be capable of being clearly ascertained. For this reason, Sir W. Grant thought that if a legacy was given to the natural child, of which a particular woman was *enceinte*, without reference to any person as the father, there would be no uncertainty in the bequest, and it would probably be held valid (*r*). And in conformity with this opinion, in a subsequent case, where a testator had given an annuity for the education of the child of which A. M. was then pregnant, Lord Eldon decided that the bequest was good; and that it was possible to hold, consistently with the doctrine of Lord Coke, that, if an illegitimate child in *ventre sa mere*, was described so as to ascertain the object intended to be pointed out, it might take under that description (*s*). But there is a difference between giving to the child with which a woman is pregnant generally, and as being the child with which she is pregnant by a particular man; and hence where a testator gave a legacy to such child or children, if more than one, as A. might happen to be *enceinte by him*; and A. at the date of the will was pregnant of a daughter, who was born shortly after the testator's death: Sir W. Grant thought he could not hold, without breaking in upon the rule laid down by Lord Coke, that there was sufficient certainty in the description of this legatee (*t*). It has been thought, however, in a later case, that this decision went too far; and that the

(*q*) Co. Litt. 3. b.; see Ward on 141; *Blundell v. Dunn*, cited 1 Legacies, 66. Mad. 433; and see 2 Roll. Abr. 43.

(*r*) 17 Ves. 532.

(*t*) *Earle v. Wilson*, 17 Ves.

(*s*) *Gordon v. Gordon*, 1 Mer. 528.

true doctrine is, that a legacy may be effectually given to a child with which an unmarried woman is pregnant, unless it be made a *condition precedent to the gift*, that the child should actually be the child of a particular individual, as the father ; and so that it could not be the testator's intention that the child in question should take at all, unless it were his child (u).

(u) *Evans v. Massey*, 8 Pri. 22.

CHAPTER XLIII.

DIFFERENT SYSTEMS OF LAW AS TO INFANCY—AND
THEIR CONFLICT.

Age of majority, in colonies and in the United States.

IN those British Colonies in which the Dutch, Spanish, or French law does not prevail, and in the United States of America, the age of complete majority is twenty-one. In some of the States, females have an enlarged capacity to act at eighteen (*a*).

The Roman Dutch Law prevails generally in British Guiana, the Cape of Good Hope, and Ceylon; the law of Spain in Trinidad; the costume of Paris in Lower Canada and St. Lucia; that of Normandy in Guernsey and Jersey, and the Code Civil in the Mauritius.

By the Civil Law; its stages of minority.

By the Civil Law, minority extended over the first twenty-four years of life, and was divided into several periods. Males below fourteen, and females below twelve, were termed *impuberes*; above that age, *puberes*; eighteen in males, and fourteen in females, was the age of *pubertas plena*; and at twenty-four, both sexes were said to attain *pubertatem plenissimam*.

Law of Spain.
Scotland.

In these particulars, the Spanish agrees with the Civil Law.

By the law of Scotland, male children under the age of fourteen, and females under twelve, are termed *pupils*; from those ages till twenty-one, *minors*; at twenty-one, they are of full age.

Old law of France.

Under the old laws of France, twenty-five was generally the full age of majority. By the law of Lower Canada, and

Lower Canada and St. Lucia.

of St. Lucia, twenty-one is the full age.

(*a*) See Burge on Colonial and Foreign Laws, part 1, c. 4.

By the *Coutume* of Normandy, which prevails in Guernsey and Jersey, twenty is the full age, but there are some restrictions upon marriage till twenty-five.

Guernsey and Jersey.

Twenty-one is the full age by the Code Civil. But males under twenty-five, and females under twenty-one, cannot contract marriage without the consent of their parents or other protectors: and even above those ages they are subject to certain restrictions.

Code Civil.

By the Roman Dutch law, minority ceases on the attainment of the twenty-fifth year.

Roman Dutch law.

The law of Holland is now regulated by the Code Civil.

Law of Holland.

In some parts of Germany twenty-one is the full age; in some, eighteen; in some, twenty-five. In Saxony twenty-one, with certain disabilities till twenty-five.

Germany.

In those British Colonies in which the Dutch, Spanish, or French law does not prevail, and in the several states of America, except Louisiana, the doctrine of the law of England, respecting the appointment of guardians by deed or testament, is followed. In the state of New York, where an infant has land, the father, or, if the father is dead and has appointed no guardian, the mother or nearest and oldest relative has the custody, during minority, with the powers of a guardian in socage; males are preferred to females in the office (*b*).

Testamentary guardianship in colonies and the United States.

In the state of New York, where an infant has land, the father, or, if the father is dead and has appointed no guardian, the mother or nearest and oldest relative has the custody, during minority, with the powers of a guardian in socage; males are preferred to females in the office (*b*).

New York guardianship in socage.

If the father has appointed no guardian, guardians may be appointed in the British colonies just mentioned, (as the Court of Chancery appoints them in England), by the governor, under an express power granted to him in his commission.

Guardianship by appointment of governor or judge.

In the several states of the Union, except Louisiana, the appointment is made by judicial authority, by the Chancellor, or by the surrogates of counties; and, in New York, such appointment supersedes the guardianship, analogous to guardianship in socage.

There are three kinds of guardianship known to the Civil

Three kinds of

(*b*) See Burge on Colonial and Foreign Laws, part 2, c. 23.

- guardianship by the civil law. **Law**; *tutela testamentaria*, conferred by testament; *legitima*, by the law itself; *dativa*, by the authority of the judge.
- Testamentary. By the Civil Law, the father, grandfather, or other ascendant, had alone the power of appointing guardians by testament.
- Legitimate. If this power was not exercised, the office of guardian at law devolved upon the relatives of the minor on either side of the house, in the order in which they would succeed to him in case he died intestate; females, except the mother and grandmother, were excluded from the guardianship.
- By judicial appointment. Where there was no testamentary guardian, and no relation to take the guardianship at law, the nomination was made in Rome, by the judge or prætor, and in the provinces by the provincial residents(c). The guardians appointed must have been within the jurisdiction of the Court by which they were nominated.
- Guardianship in Scotland. In Scotland, a father may by deed or will appoint guardians or *tutors nominate* for his children, during *pupillarity*; if there be no *tutor nominate*, the nearest male relative on the father's side is *tutor at law*, and if the office is not claimed, the Court of Session appoints a *tutor dativæ*. The mother, after the father's death, has, generally speaking, the custody of the person till the age of seven.
- From fourteen the minor's person is free, but his property may be under the management of curators appointed either by the father, or at the instance of the minor, by the Court. Tutorship or curatory is determined by the marriage of a female minor.
- Spanish law. The provisions of the Spanish law, on this subject, are, generally speaking, the same with those of the Scotch law, but, under the former, guardians may be appointed by a mother or grandmother, and even by strangers, in respect of property bequeathed by them to the minor.
- Lower Canada and St. Lucia. The *tutela dativæ* was alone known to the old *Coutume de*

(c) Just. Inst., lib. 1, tit. 20.

Paris, which obtains in Lower Canada and St. Lucia. A judge, upon request, directs the convocation of a council of relatives and friends, who nominate, upon oath, a tutor and tutor *surrogate*, (the latter to act only as a check upon the former, and to act for the interests of the minor when opposed to those of the guardian); the tutors thus nominated are appointed by the judge.

By the Code Civil, the guardianship belongs to the surviving parent, who may, by a declaration made before a justice of the peace assisted by his registrar, or before notaries, appoint guardians to act after his or her own death (*d*). Various restrictions are imposed upon widows who marry again (*e*). Code Civil.

After the person appointed by the surviving parent, the paternal grandfather has a right to the office of *guardian at law*; then the maternal grandfather, and so on, the paternal line coming before the maternal in the same degree. A *tuteur subrogé* is appointed by the family council, (the constitution of which will be stated below), at the time when the guardian at law enters upon his office.

In the absence of any other guardian, a *tutor dative* is appointed under the Code Civil, by a family council, consisting of the justice of peace of the domicile, and the six nearest relatives who reside in the neighbourhood, selected in a certain order; or in their absence, of intimate friends of the parents: a *tuteur subrogé* is also appointed, for the purposes already mentioned.

Most of these provisions are in force in the State of Louisiana. Louisiana.

By the Roman Dutch law, a guardian may be appointed by testament, not only by those who might have exercised that power under the civil law, but also by a mother or grandmother: and even by strangers, in respect of property bequeathed by them to the minor. Roman Dutch law; testamentary guardian.

(*d*) Art. 302, 308.

(*e*) Art. 402.

Guardian appointed by the magistrate.

This system of law knows no *tutela legitima*; but in the absence of a testamentary guardian, the Orphan Chamber of the place where the minor is domiciled (or if it has been excluded from interposing by the will of the father or mother, then a magistrate) selects guardians from among the next of kin.

Emancipation before majority.

Under some systems of law, the rights of majority may be wholly or partially acquired by minors (*g*).

Civil law.

The civil law sanctioned a grant, by the sovereign, of the *venia ætatis*, to males at twenty-one, and to females at eighteen: this grant did not, except in special cases, include the power of disposing of real property; but it conferred all the other privileges of majority, and prevented the minor from being relieved against acts done by him after he had obtained it.

Grants of this kind, called lettres de benefice d'âge, were known to most of the old French coutumes.

Code Civil.

Under the Code Civil, a minor is emancipated, and attains the rights of majority at once, by marriage; or if he has completed his fifteenth year, by the declaration of the father, and in case of his death, of the mother, before the justice of the peace, attended by his registrar; or if the parents are dead, it may be effected at the age of eighteen, with the consent of the family council (*h*).

The *venia ætatis* is known to the Spanish and to the Roman Dutch law; but its grant depends upon the conduct and discretion of the minor. By the latter system, marriage confers all the powers of majority.

English law regards all persons under 21 as minors while within its limits; and as to realty within its limits.

The law of England (*i*) considers all persons under twenty-one as minors, while they are within the limits where it prevails, whatever may be their condition in the country where they usually reside; and it does not permit real estate in England to pass by the will of any person under twenty-one.

(*g*) 1 Burge, 116. (*h*) Art. 477, 478. (*i*) See 1 Burge, c. 4.

When it has to determine the validity of contracts, into which persons under twenty-one have entered, out of England, it is guided by the law of the country in which the contract was made (*k*). And as personal property follows the law of the domicile, it seems, that personalty situated in England may pass by the will of a person authorized to bequeath it by the law of the country where he is domiciled.

Personal contracts determined by the local law.

Personalty in England passes by will of foreigner under 21, authorized by his own law to make will, *semble*. Personal property sometimes paid to foreign minor.

So, personal property will, under certain circumstances, be paid to an owner who, if domiciled and resident in England, would not be allowed to receive it.

On a late occasion, the residuary legatee was a minor, married to a husband who was a minor, both being subjects of, and resident in, Portugal. But it appeared, that the disabilities of a female minor cease in Portugal on marriage, and that the husband, as holding a commission in the army, was considered as of full age. Under these circumstances, administration with the will annexed, limited to the receipt of certain dividends in the English funds, was granted to the wife (*l*).

The English law recognises the paternal authority, even in aliens (*m*), but if an infant has a guardian appointed by any authority (other than the father's), out of the jurisdiction of the English Courts, (as by the Governor of the Leeward Islands), the appointment fails as soon as the infant comes to England, and the Court of Chancery will appoint a guardian on petition (*n*). It seems that if a father not domiciled in England were to appoint guardians by will, manifestly intending to confer upon them those powers which belong in England to the office, such an appointment would be held good in England (*o*).

English law recognises paternal rights of aliens,

but not foreign guardianship.

(*k*) *Dalrymple v. Dalrymple*, *supra*, p. 179; *Male v. Roberts*, *supra*, p. 503.

(*l*) *In the goods of the Countess De Camilla*, 1 Hagg. 237.

(*m*) *De Mannoville v. De Mannoville*, *supra*, p. 146.

(*n*) *Ex parte Watkins*, 2 Ves. 470.

(*o*) *Beattie v. Johnstone*, 19 L. J. 300.

Guardianship of land is local by all systems of law, Guardianship of the person is local by the English law.

The guardianship of immoveable property is in all countries considered to belong to the person appointed according to the law of the country where the property is situated; but many foreign jurists differ from the English, in considering the guardianship of the person, and the right to receive the infant's personal property, to be quite independent of the place in which the infant and his guardian may happen to be.

In a late case, administration for the use and benefit of the minor children of a Frenchman deceased, was granted to the guardian appointed by the French authorities (*p*).

Domicil of father is domicil of child.

The domicil of children is, in the first instance, that of their father, and generally changes along with his. But many questions might arise on this subject. Supposing, for instance, that a father should go abroad, and acquire a foreign domicil, and should carry with him his child, a ward of Court, under the conditions which the Court imposes, which all imply the right of the Court to reclaim the child at any moment, it is difficult to believe that the Court would deem the child's domicil to have been altered by this permissive residence abroad, so as to affect the succession to his property if he should die.

Minor cannot acquire a domicil by his own acts.

Lord Alvanley has said, speaking of a Scotch boy sent to England for education (*q*), "It cannot be contended, that during the state of pupillage, he could acquire any domicil of his own. I have no difficulty in laying down, that no domicil can be acquired till the person is *sui juris*:" that is to say, (as Sir W. Grant explained it (*r*)), he cannot acquire a domicil by his own acts.

Children residing with mother may acquire

But it has been decided, that (*s*) after the death of the father, children remaining under the care of the mother follow

(*p*) In the Goods of Sartoris, 1 Curteis, 910.

(*r*) In Pottinger v. Wightman, 3 Mer. 79.

(*q*) In Somerville v. Lord Somerville, 5 Ves. 787.

(*s*) Pottinger v. Wightman.

the domicile which she may acquire, provided the domicile shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession to their property: but it is the opinion of an eminent foreign writer (*t*), that such fraud would be presumed if no reasonable motive could be assigned for the change.

new domicile if
she acts in
good faith.

Whether the same rule would hold in the case of a child residing in the family of a legal guardian who is not a parent, has not been decided.

Although a minor cannot acquire a new domicile by his own acts, yet there can be little doubt that if an infant at years of discretion does, with the approbation of his father, any act which would, in the case of an adult, create a new domicile, as, if he proceeds to India in the service of the East India Company, he would thereby acquire a new domicile. Some doubt might be felt, whether an infant, who has neither father nor mother, nor legal guardians, could acquire a new domicile by such means.

The Scotch law allows a minor, past the age of pupillarity, to choose his own domicile (*u*). If then a minor of this description, having lost his parents, should abandon Scotland, and fix himself in England, and die there under age; the English law would probably consider him to have been domiciled in Scotland, and the Scotch law would consider him to have been domiciled in England: and his personal property situated in England would be distributed according to the Scotch law of succession, and *vice versa*.

Conflict of laws.

Where an infant's property lay wholly in Scotland, and certain persons residing generally in that country had been appointed by the father to be tutors and curators to take care of the Scotch estates, they were, by consent, associated in the guardianship with persons residing in England, and the usual

(*t*) Pothier, cited *Ibid*.

on Personal Succession, 201; see

(*u*) Per Lord Cringletie in the *Case of Wallace*, cited, Robertson

Ersk. Inst. b. 1, tit. 7, s. 14, and the authorities there referred to.

reference was made to the Master, to inquire into the fortune and approve of a scheme of education (*x*).

In this case, the tutors and curators appeared and claimed the guardianship from the Court of Chancery; but if they had not done so, the infant's property being in Scotland, the Court would not, it is conceived, have charged itself with responsibility, for an infant having no accessible property, any more than it would for an infant having no property at all (*y*).

(*x*) *Beattie v. Johnstone*, 19 L. J. 300; see p. 111, *supra*.

(*y*) *Supra*, p. 101.

APPENDIX IV.

WALTON *v.* JEFFERIES AND PARSONS.—16th June, 1747.

(11 HILL, MSS. 338.)

THE bill in this case was to be relieved against a bond entered into by the plaintiff as surety for the defendant Parsons, who at the time of entering into the bond was an infant.

The bond was for payment of an annuity of £100 a-year to the defendant Jefferies during the joint lives of the defendants Jefferies and Parsons; and an injunction was prayed to stay the defendant Jefferies's proceeding in an action at law upon this bond against the plaintiff.

And now, upon motion for an injunction, it appeared by the defendant Jefferies's answer, that £395 was only paid to the defendant Parsons as a consideration for this bond, but that the whole consideration was £500, viz. the £395 in money paid to the defendant Parsons, and 100 guineas won of him by bets at a cricket match, and other 50 guineas, and two sums of 25 guineas.

And in giving judgment upon the motion, Lord Hardwicke, Chancellor, declared, that he took a bet at a cricket match to be within the stat. of 9th Anne, c. 14, which provides, that all securities given or entered into where the whole or any part of the consideration is for money won at play shall be void, and amongst the games mentioned is that of bowls, which is very similar in respect of the bowling to that of cricket; but the general words, other game or games, or by betting on the sides or hands of such as do game at any of the games aforesaid, are very strong to prove the game of cricket to be within the statute; and he declared his present opinion to be, but without prejudice, that cricket is a game within the statute; and said, that to construe the statute otherwise would be making a most rigid and unreasonable construction, when all former resolutions had been otherwise to give it a most liberal construction for advancing the remedy, as in a case which was mentioned at the bar where bets at a cock-fighting were held to be within the statute.

IV.
WALTON
v.
JEFFERIES
AND PARSONS.
Liability of
surety on bond,
the principal
being an infant,
and not liable.

IV.
WALTON
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JEFFERIES
AND PARSONS.

But he said, that exclusive of this, he took it to be such a case as the Court ought to interpose in, for that there is nothing that this Court holds a stricter hand over than the contracts of infants. Here the infant himself has entered into a bond for payment of this annuity, and the bond in question was entered into by the plaintiff as a collateral security; and if such collateral bonds were suffered to take place, it might be a means to avoid all the care which this Court takes of infants' contracts. For if an infant near of age should be induced to enter into a bond with such security, though he might reasonably think that such bond might be avoided in respect to himself as to his infancy, yet he might think himself from a mistaken principle of honour obliged to pay it, rather than throw the burden upon his security, and so deprive himself of his property before he has experience to know the use and advantage of it, contrary to the reason of law and the rules of equity. Therefore, upon the whole, thinks it a fit case for the Court to grant an injunction until the hearing, and an injunction was ordered accordingly; and it being then prayed on behalf of the defendant Jefferies that the plaintiff might give judgment upon the bond in question with release of errors—

Lord Chancellor at first refused this, but upon recollection ordered it, saying that the Court might nevertheless send the matter to be tried.

APPENDIX V.

Forms.

I.

Reference as to Guardian and Maintenance on Petition.

IT is ordered, that it be referred to Mr. S, one &c., to (a) approve of a proper person or persons to be appointed guardian or guardians of the person and estate of the petitioner during her minority. And it is ordered, that all proper parties have notice to attend the said Master thereon, and be at liberty to propose such guardian or guardians. And it is ordered, that the said Master do inquire and state the petitioner's age, and the nature and amount of her fortune, and what relations she has, and on what evidence or ground he approves of such person or persons so to be appointed guardian or guardians. And it is ordered, that the said Master do inquire and state what will be proper to be allowed for the maintenance and education of the petitioner during her minority, and from what past period such allowance should commence, and out of what fund it should be taken. And after the said Master shall have made his report, such further order shall be made as shall be just. *In matter of Arnold*, M. R., 1st December, 1814; Reg. Lib. A. 1814, fol. 50; Set. Dec. 277.

V.
FORMS.

II.

The same in a Suit, with reference as to Maintenance in Time past.

It is ordered, that the Master to whom this cause shall be referred shall approve of a proper person to be appointed guardian or guardians of the plaintiff, the infant, during his minority, and all proper parties are to have notice to attend the said Master thereon, and be at liberty to propose such guardian or guardians. And it is ordered, that the said Master shall state the said infant's age, and the nature and amount of his fortune, and what relatives he has,

(a) It has become not unusual of late to refer it to the Master to inquire whether the petitioner has or has not a legal guardian or guardians, and if he shall find that she has not, then to approve &c., (as above).

V.
FORMS.

and state on what evidence or grounds he approves of any particular person or persons to be such guardian or guardians. And it is ordered, that the said Master shall [inquire and state who has maintained the said plaintiff, the infant, since the death of the said M. F., and] consider what allowance ought to be made for the maintenance of the said plaintiff, the infant, [from the death of the said M. F., and] for the time to come during his minority, and out of what fund such allowance ought to be paid, and to whom. And it is ordered, that the said Master shall state the result of the said inquiries, with his opinion thereon, to the Court. *Lundin v. Darvill*, 24th June, 1841; Reg. Lib. 1840, B. fol. 761.

III.

The same in a Suit, adapted to special Circumstances.

It is ordered, that it be referred to the Vacation Master to approve of a proper person or persons to be appointed guardian or guardians of the person of the said plaintiff A. A., the infant; and the said Master is to inquire and state to the Court what relations the said plaintiff has; and also to state on what evidence or ground he approves of any particular person to be such guardian or guardians; and also to approve of some person or persons to have the custody and care of the said infant, and the superintendence of her education, during her minority; and if, in making the said inquiries, the said Master shall find that J. A., deceased, the surviving parent of the said infant, has left any written request or direction touching the said infant's maintenance, education, or residence, it is ordered that he shall be at liberty to take such special circumstances into consideration: and the said Master is also to consider what will be proper to be allowed for the maintenance and education of the said plaintiff, the infant, and for the expenses of her residence at B. House (a), in the petition mentioned, to commence from the 5th day of June last past, the day on which the said infant's mother, the said J. A., died, and for the time to come during her minority, and to state out of what fund such allowance ought to be paid; and, after the said Master shall have made his report, such further order shall be made as shall be just. *Knightley v. Leigh*, 13th July, 1833; Reg. Lib. 1832, A. fol. 2383.

(a) The family mansion of the infant.

IV.

V.
FORMS.*Reference in a Suit, as to Maintenance past and future.*

(1.)

It is ordered, that it be referred to Mr. Thomson, one of the Masters of this Court, to inquire and state to the Court who has maintained and educated the plaintiffs W. P. B. C. and E. P. B. C., the infants, since the death of the said W. C., their father, and what has been properly expended, or ought to be allowed, on that account; and he is to consider what will be proper to be allowed for the maintenance and education of the said plaintiffs, the infants, respectively for the time to come, and out of what fund the same ought to be paid, and to certify the same with his opinion thereon to the Court; and, after the said Master shall have made his report, such further order shall be made relating thereto as shall be just. *Chatteris v. Young*, Reg. Lib. 1819, A. fol. 189.

(2.)

It is ordered, that it be referred to the Master in rotation to consider and state to the Court what will be fit and proper to be allowed for the maintenance and education of the said defendants, the infants, respectively for the time past, since the death of the said testator, and for the time to come, during their respective minorities, and out of what fund the same should be paid. *Mills v. Robarts*, Reg. Lib. 1829, A. fo. 1958.

V.

Direction for Reference whether Father of Ability.

His Honor doth think fit, &c., that it be referred to Mr. A., one &c., to see what is fit and proper to be allowed for the maintenance and education of the defendants, the infants, for the time past and to come, and whether the plaintiff William Bailey, the father, is of sufficient ability to maintain the said defendants the infants or not, and state the same to the Court, and thereupon such further order shall be made relating thereto as shall be just. *Bailey v. Arscot*, M. R., 20th May, 1747; Reg. Lib. A. 1746, fol. 378; Set. Dec. 285.

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VI.

Order confirming Report of Guardian and Maintenance, where the Reference has been made upon Petition only.

His Honor doth order that the said report, bearing date the 14th day of March, 1815, be confirmed, and upon the said J. D. entering into a recognizance, to be approved by the said Master, to be answerable for what he shall receive of the fortune of the said E. A., the infant, it is ordered, that the said J. D. be appointed guardian of the person and fortune of the said E. A., the infant, during her minority, or until the further order of this Court; and it is ordered, that the sum of £——, certified by the said Master's said report as proper to be allowed, be allowed for the board and maintenance of the said E. A., the infant, from the 6th day of January, 1813, until such time as she shall be removed from the said T. C.; and it is ordered, that the said T. C. do retain such sum of £—— out of the arrears of rent due from him; and it is ordered, that the sum of £—— be allowed for the maintenance and education, clothing and entrance-money for the said E. A., the infant, for the first year she shall be with the said Mesdames &c.; and it is ordered, that the sum of £—— a-year, certified by the said Master's said report as proper to be allowed, be allowed for the maintenance and education of the said E. A. during her minority, or so long time as she shall remain under the care of the said Mesdames, &c.; and it is ordered, that such sum be paid out of the rents and profits arising from the real estate to which the said E. A. is entitled; and it is ordered, that it be referred back to the said Master, to whom this cause stands referred, to tax the petitioner and all other parties their costs of obtaining the order dated the 1st day of December last, and of the proceedings had thereupon, and also of this application, and the subsequent proceedings to be had thereon, as between solicitor and client; and it is ordered, that such costs, when taxed, be retained by the said J. D. out of the rents and profits of the said estates. *Re Arnold*, Reg. Lib. 1814, A. fol. 699.

VII.

Order in a Suit, confirming Report of Guardian and Maintenance.

His Lordship doth order, that the Master's separate report, bearing date the 26th February, 1842, in the said petition mentioned, be

confirmed. And it is ordered, that H. L., the mother of the petitioner, the infant plaintiff, be appointed the guardian of the petitioner during his minority, or until the further order of this Court; and it is ordered, that the sum of £——, certified by the said Master as proper to be allowed to G. W., in the petition named, for money paid by him for the past maintenance of the said infant, as in the petition mentioned, to the 16th day of January, 1842, be paid to the said G. W., by the receiver appointed in this cause, out of the rents and profits of the leasehold houses in the petition mentioned. And it is ordered, that the annual sum of £——, certified by the said Master as proper to be allowed for the maintenance of the petitioner, from the said 16th day of January, 1842, for the time to come, be paid to the said H. L. during the minority of the petitioner, or until the further order of this Court, by the said receiver, out of the rents and profits of the said leasehold houses, by weekly payments of £——; and it is ordered, that it be referred to the said Master to tax the costs of the petitioner of, and to be occasioned by, the inquiries in the said petition mentioned by the said decree directed of this application. And it is ordered, that such costs, when taxed, be paid to the said G. W., the petitioner's next friend and solicitor, by the said receiver, out of the said rents and profits of the said leasehold houses; and it is ordered, that the several payments hereby directed to be made by the said receiver, be allowed him in passing his accounts before the said Master. *Lundin v. Darvill*, Rolls, 22nd March, 1842; Reg. Lib. 1841, B. fol. 614.

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VIII.

Appointment of Guardian, without Suit or Reference, for a special purpose.

This Court doth order, that T. P. C., the son, in the said petition mentioned, be appointed the guardian of the persons and estates of the said infants, H. R. C. and J. C., for the purpose of consenting before the respective Committees of the Right Honourable the House of Lords and the Honourable the House of Commons, for and in behalf of the said H. R. C. and J. C., and each of them, to the passing into a law of the bill in Parliament in the said petition mentioned, intituled "An act," &c., and to all such clauses and provisions to be therein contained as Parliament shall deem requisite,

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and as the said T. P. C., the son, shall approve of on behalf of the said infants respectively. *Ex parte Courtenay*, Reg. Lib. 1841, A. fol. 822.

IX.

Appointment of Guardians in a Suit, without Reference.

His Honor doth order, that the said defendants, R. T., E. W., and W. E., be appointed guardians of the plaintiffs W. P. B. C. and E. P. B. C., the infants, during their respective minorities, or until the further order of this Court. *Chatteris v. Young*, Reg. Lib. 1819, A. fol. 189.

X.

Order for Maintenance, made without a Reference.

It is ordered, that the said petitioner, S. C. [the guardian appointed by the same order] do apply the rents and profits of the copyhold estate in the petition mentioned, received by him, in or towards the maintenance and education of the petitioner J. G., the infant, during his minority, or until the further order of the Court. *Ex parte Green*, Reg. Lib. 1819, A. fol. 1248.

XI.

Order for Liberty to take Infants abroad.

His Lordship doth order that the petitioner, as the father of the said infants, plaintiffs, be at liberty to remove the said infants, plaintiffs, with him to America aforesaid, or to such other parts and places beyond the seas, and out of the jurisdiction of this Court, in which he shall in the execution of his duty be ordered or find it necessary to reside, there to remain with the petitioner in case the petitioner shall so think fit; the petitioner, by his said petition, undertaking to bring the said infants, plaintiffs, or such of them as shall then be living, back with him, on his return to this country, on the fulfilment of his mission in the petition mentioned, unless the petitioner shall in the mean time, from any unforeseen circumstance, deem it advisable to send them, or any of them, back to this country. But the petitioner is half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and educa-

tion for each of the said infants, actually adopted and in practice at the time of such half-yearly return, and specifying particularly where and with whom they reside. *Jackson v. Hankey*, L. C., 15th May, 1823; Reg. Lib. A. 1822, fol. 1088: *S. C. Jac.* 265, note; Set. Dec. 288.

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XII.

ORDERS CONNECTED WITH THE WRIT OF HABEAS CORPUS.

Order for Habeas Corpus for Delivery of Children to Father.

His Lordship doth order that a writ of habeas corpus do issue, returnable immediately, directed to the said Emily Mary Marchioness of Salisbury, and Emily Anne Bennett Elizabeth Countess of Westmeath, to bring before his Lordship the bodies of Lord Delvin and Lady Rosa Nugent, at his Lordship's room at Westminster, on Saturday morning the 19th instant, at 11 o'clock. *In the Matter of the Children of the Earl of Westmeath*, L. C., 16th June, 1819; Reg. Lib. A. 1818, fol. 1359; Set. Dec. 281.

Order on Habeas Corpus for delivery of Children to Father.

His Lordship doth order that the bodies of the said Lord Delvin and Lady Rosa Nugent, the children of the said Earl of Westmeath, be delivered to him. *In Matter of Children of Earl of Westmeath*, L. C., 23rd June, 1819; Reg. Lib. A. 1818, fol. 1534: *S. C. Jac.* 251, note; Set. Dec. 281.

Order for Habeas Corpus for bringing up Children on application of Father.

His Lordship doth order that a writ of habeas corpus do issue, directing the said defendants, George Blenkin, and Mary his wife, to bring into this Court the plaintiffs, Mary Lyons, Francis Lyons, and Jane Beatson Lyons, the infant children of the said John Lyons, at the sitting of this Court, at Westminster Hall, on the 10th of February next. *Lyons v. Blenkin*, L. C., 15th January, 1820; Reg. Lib. B. 1819, fol. 208: *S. C., Jac.* 247; Set. Dec. 281.

Writ of Habeas Corpus in the above Case.

George the Third, &c.—To George Blenkin, and Mary his wife, greeting. We command you, that you do on Thursday, the 15th day of February next, bring before us in our Court of Chancery, at

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the sitting thereof, at Westminster Hall, the bodies of Mary Lyons, Frances Lyons, and Jane Beatson Lyons, or by whatsoever name or addition they are known or called, who are detained in your custody, to perform and abide such order as our said Court shall make in their behalf. And hereof fail not, and bring this writ with you. Witness ourself, at Westminster, the 29th day of January, in the 60th year of our reign. From a MS. of Mr. Jacob. Set. Dec. 282.

The Return to the above Writ.

The within-named George Blenkin, and Mary his wife, do hereby certify to the Right Honourable the Lord High Chancellor of Great Britain, that the within-named plaintiffs, Mary Lyons, Frances Lyons, and Jane Beatson Lyons, are detained by and are under the protection of the said Mary Blenkin, in the parish of Sculcoates, in the county of York, for the purpose of their being educated and maintained by her as their guardian, under the will of their grandmother Mary Beatson, deceased, and according to the trusts and directions for those purposes contained in the said will. Dated the 9th of February, 1820. From a MS. of Mr. Jacob: *S. C. Lyons v. Blenkin, supra*; Set. Dec. 282.

XIII.

Reference for Marriage of Ward.

Whereas the said defendants, John Middlemarsh and Thomas Dawson did, on the 27th instant, prefer their petition unto the Right Honourable the Master, &c., shewing, among other things, that &c.; and therefore it was prayed, that &c.; whereupon the parties concerned were ordered to attend his Honor on the matter of the said petition. And counsel for the defendants the petitioners, the defendant Hester Williams, and the plaintiffs this day attending accordingly. Upon hearing the said petition read, and what was alleged by the counsel for the said parties, his Honor doth order that it be referred to the said Master to see whether the match proposed for the defendant Hester Williams, the infant, be a fitting match for her or not. And the said John Le Keux is to lay proposals before the said Master of what settlement he intends to make on the said defendant Hester. And the said Master is to

state the same, with his opinion thereon, to the Court. And after the said Master shall have made his report, such further order shall be made relating thereto as shall be just. *Lawrence v. Middlemarsh*, M. R., 31st October, 1746; Reg. Lib. B. 1746, fol. 2; Set. Dec. 287.

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XIV.

Order on Confirming Report.

[*Inter alia.*] His Lordship doth order that the said Master's report stand confirmed, and that the articles be entered into in order to the carrying the said proposals into execution, as far as the nature and circumstances of the case will admit, with the approbation of the said Master. And it is further ordered, that the plaintiff be at liberty to marry the said Katherine Archer on the footing of the said proposals. *Earl of Plymouth v. Lewis*, L. C., 24th April, 1750; Reg. Lib. A. 1749, fol. 256; S. C. 2 Dick, 801; Set. Dec. 288.

XV.

Reference to inquire whether a Suit is for the Infant's benefit, and whether the next Friend is a fit Person to conduct it.

It is ordered, that it be referred to the Master of this Court in rotation to inquire and state to the Court whether this suit is for the benefit of the plaintiffs the infants, and whether H. B., the next friend of the plaintiffs the infants, is a fit and proper person to be the next friend of the said plaintiffs. And in case the said Master shall find that this suit is for the benefit of the plaintiffs, and that the Master shall find that the said H. B. is not a fit and proper person to be the next friend of the said plaintiffs, then and in such case it is ordered, that the said Master do inquire and state to the Court who will be a proper person to be appointed the next friend of the said plaintiffs to conduct this suit, and the said Master is to be at liberty to state any special circumstances as he shall think fit, and after the said Master shall have made his report, such further order shall be made as shall be just. *Nalder v. Hawkins*, Reg. Lib. 1833, B. fol. 464, 16th November, 1833.

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XVI.

Reference to inquire whether two Suits relate to the same Matter, and, if so, which is the more beneficial.

This Court doth order that it be referred to Mr. Cox, one of the Masters of this Court, to whom some matters in the first-mentioned cause stand referred to, to look into the plaintiff's bills filed in each of the above-mentioned causes, and ascertain whether they are both for the same matters; and if the said Master shall find they are so, then it is ordered that the said Master do certify to the Court which of the said bills is most proper, and for the benefit of the said infants to be prosecuted; and the said Master is to be at liberty to state any special circumstances to the Court; and it is ordered that all further proceedings in these causes be stayed until after the said Master shall have made his report, whereupon such further order shall be made as shall be just. *Mortimer v. West, Forde v. West*, Reg. Lib. 1817, B. 106 (a).

XVII.

Decree of Foreclosure against Infants.

This is the common decree of foreclosure, with the addition of the words "and this decree is to be binding on the said defendants, the infants, unless they respectively being served with a subpoena to shew cause against the same, they, or any or either of them, shall, within six months after he, she, or they shall have attained respectively the ages of twenty-one years, shew unto this Court good cause to the contrary." *Williamson v. Gordon*, Reg. Lib. 1810, B. fol. 644.

XVIII.

Order to make Foreclosure absolute.

Let the defendants J. W. K. &c. (adults) stand from henceforth absolutely barred and foreclosed of and from all right, title, interest,

(a) See p. 371, *supra*. If it can be shewn clearly to the Court, that the suits are not for the same purpose, the order for the reference will be discharged on motion, with costs. If the Master finds that they are not for the same purpose, the party who obtained the order will be made to pay the costs of the reference.

and equity of redemption of, in, and to the said mortgaged premises, and also let the defendants M. K. &c., the infants, in like manner stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises, unless they being served with a subpoena to shew cause against the same shall, within six months after they shall respectively attain their respective ages of twenty-one years, shew unto this Court good cause to the contrary. *Williamson v. Gordon*, Reg. Lib. 1811, B. fol. 829 & 845.

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XIX.

Decree of Foreclosure against Infants (having the legal Estate in them) in favour of Equitable Mortgagee.

His Lordship doth order and decree, that it be referred to the Master of this Court in rotation to take an account of what is due to the plaintiff for principal and interest in respect of the mortgage security in the pleadings mentioned, and to tax the costs of this suit. And upon the defendants, or any or either of them, paying to the plaintiff what the said Master shall find due to her for such principal and interest as aforesaid, and for the costs of this suit, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered that the plaintiff do deliver up to the defendants so paying her, the memorandum in the bill mentioned, and do execute all necessary acts and deeds for releasing and discharging the premises in question from payment of the principal and interest secured on the same, and from any incumbrances done by her, or any claiming under her, and deliver, upon oath, all the title-deeds and writings in her custody or power, relating to the said premises, to the defendants, or as they shall direct. But in default of the defendants, or any of them, so paying to the plaintiff what shall be found due as aforesaid, at the time aforesaid, the defendants are, from thenceforth, to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption, of, in, and to the said premises. And in case of such foreclosure, the defendants are to deliver up to the said plaintiff the possession of the said mortgaged premises. And the defendants Thomas Carver and Mary his wife, John Dodwell and William Dodwell, and the defendants the

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infants, William Dodwell the younger, Sarah Dodwell, Mary Dodwell, and Theresa Dodwell, on their attaining twenty-one, are to do all necessary acts, so as duly to convey, surrender, and assure the same to the plaintiff. And this decree is to be binding on the defendants the infants, unless on being served with subpoena they shall, within six months after they shall attain the age of twenty-one, shew unto this Court good cause to the contrary. And for the better taking of the said accounts, the parties are to produce before the said Master, upon oath, all deeds, papers, and writings in their custody or power relating thereto; and are to be examined upon interrogatories as the said Master shall direct, who, in taking the said account, is to make unto the parties all just allowances, and any of the parties are to be at liberty to apply to this Court as they may be advised. *Price v. Carver*, 3 M. & C. 163.

XX.

Permission for Infant on coming of Age to put in a new Answer and make a new Defence.

His Lordship doth order, that the defendant, John Kelsall, be at liberty to put in a new answer to the plaintiff's bill; and it is ordered, that the plaintiff be at liberty to reply to such answer, and bring on the cause again to a hearing as to the said defendant; and it is ordered, that the said defendant be at liberty to proceed with the examination of his witnesses, and the plaintiff is to be at liberty to cross-examine such witnesses, and make use of depositions of the witnesses already examined at the hearing of this cause; but he is not to examine any further witnesses on his part.

Ordered, that the costs of the plaintiff, and of the said defendant John Kelsall, of this application and consequent thereon, be costs in the cause. *Kelsall v. Kelsall*, Reg. Lib. 1833, A. fol. 913; *supra*, p. 416.

XXI.

Order for Infant to convey on coming of Age.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, &c., by Mr. C. of counsel with Edmund Garforth, it was alleged &c., that, by the decree made

in these causes, the said manor of Grimstone was directed to be sold, &c.; in pursuance whereof William Garforth hath been reported, and stands absolutely confirmed, the best purchaser of the said manor, at the sum of £——; that the said William Garforth afterwards paid his purchase-money, &c., and all parties executed the conveyance of the said premises, except the said Edward Wright Stanhope; that the said Master, by his report, dated the 9th instant, (among other things), certified, that he conceived that the said Edward Wright Stanhope, being devisee of the said real estate, was a proper party to join in the conveyance of the said estate to the heirs or assigns of the said William Garforth, (he being then dead); and that it appeared to him, by the affidavit of &c., that the said Edward Wright Stanhope had then attained his age of twenty-one years; and, therefore, it was prayed, that the said Edward Wright Stanhope might be directed to execute the conveyance, &c.: Whereupon, and upon hearing an affidavit of notice of this motion to the said Edward Wright Stanhope, the said Master's report, and an order dated the 3rd day of March, 1744, read, and what was alleged by the counsel for the said Edward Garforth, his Lordship doth order, that the said Edward William Stanhope do join in the conveyance of the said premises to Edward Dring, now Garforth, pursuant to the said report, on his being served with this order. *Stanhope v. Stanhope*, L. C., 23rd July, 1748; Reg. Lib. B. 1747, fol. 401; Set. Dec. 272.

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